NO. 88 - 88-7381

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM GEORGE BONIN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA
AND
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

OFFICE OF THE
STATE PUBLIC DEFENDER

WILLIAM DEAN FREEMAN
Deputy State Public Defender

ADRIAN K. PANTON
Supervising Deputy
State Public Defender

107 South Broadway, Suite 9111
Los Angeles, California 90012
Telephone: (213) 620-5430

Attorneys for Petitioner

82 pp

QUESTIONS PRESENTED

1. Was the death judgment invalid under the Sixth and Fourteenth Amendments as violating petitioner's right to the effective assistance of counsel, where counsel had conflicts of interest with petitioner due to: (1) the fee for representing petitioner was based upon a literary rights agreement to his life story; and (2) petitioner's trial counsel had an attorney-client relationship with a key prosecution witness?

2. Was the death judgment invalid under the Eighth and Fourteenth Amendments as violating the principles established in Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440 (1987), where the prosecutor argued during the penalty phase that the jury should speculate upon, and consider as a nonstatutory factor in aggravation, the impact that petitioner's crimes had on the families of the victims?

* * * * * *

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 88 - _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM GEORGE BONIN,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM GEORGE BONIN respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California, affirming his sentence of death.

OPINION BELOW

The opinion of the California Supreme Court is reported at 47 Cal.3d 808, ___ P.2d ___, and is reproduced in the Appendix at A1-A55. The unreported order denying the petition for rehearing appears at A56.[1]

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

The judgment of the Supreme Court of California affirming petitioner's conviction of capital murder and the sentence of death imposed by the trial court was rendered on January 9, 1989. A petition for rehearing was timely filed

[1] In the proceedings below, petitioner William George Bonin appeared as defendant and appellant; the People of the State of California appeared as plaintiff and respondent.

on January 24, 1989 (Cal. Rules of Court, rule 27 (b)), and denied on March 2, 1989 (Appendix A56). On April 18, 1989, Justice O'Connor extended the time for filing this petition to and including May 31, 1989 (Appendix A57).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth, Eighth and Fourteenth Amendments, are set forth in full at Appendix A58.

STATEMENT OF THE CASE

A. Procedural History

On January 6, 1982, petitioner was convicted by jury of ten counts of murder (Cal. Pen. Code, § 187) and ten counts of robbery (Cal. Pen. Code, § 211). The murder convictions were accompanied by special circumstance findings that rendered petitioner eligible for the death penalty: murder during the course of a robbery (Cal. Pen. Code, § 190.2(a)(17)(i)); and multiple murder (Cal. Pen. Code, § 190.2(a)(3)). (Appendix A59-A60.)

On January 20, 1982, the jury returned ten death verdicts. On March 12, the trial court denied petitioner's automatic motion for a reduction of his sentence and imposed a death judgment (see Cal. Pen. Code, § 190.4(e); Appendix A61-A62).

The conviction and judgment were subsequently affirmed by the California Supreme Court on automatic appeal (People v. Bonin, 47 Cal.3d 808, ___ P.2d ___ (1988)).

B. Factual Summary

The nude bodies of ten young males, ranging in age from 12 to 19, were found in various locations, often adjacent to freeways, in Los Angeles County between August 6, 1979 and June 3, 1980.

All but one of the victims died by ligature stangulation. The one exception died as a result of multiple stab wounds, although he too bore ligature marks on the neck. Each body exhibited signs of beating on the face and elsewhere, and all but one exhibited ligature marks on the ankles and/or wrists. Most of the bodies displayed indications of sexual activity prior to death.

Petitioner's identity was established primarily by two accomplices who testified that they were with petitioner in his van during three of the homicides.

The testimony of several expert witnesses circumstantially supported petitioner's identity as well: (1) triskelion-shaped fibers found on three of the bodies were linked to carpeting in petitioner's van; (2) three of the bodies revealed the presence of foreign hair matching petitioner's; and (3) petitioner's home and van were stained in several places with human blood.

Several witnesses testified that petitioner confessed or made damaging admissions in their presence. A local television reporter testified that petitioner admitted his responsibility for the deaths of the victims. Two acquaintances of petitioner testified he admitted one of the killings, and jailhouse informers testified as to other various admissions. Other witnesses testified that petitioner had mentioned that he would kill witnesses to his sexual escapades.

At the penalty trial, petitioner's criminal history was presented. Petitioner sexually attacked four boys, ranging in age from 12 to 18, in separate incidents in 1968 and 1969. As a result of these activities, petitioner was committed to a state mental hospital as a mentally disordered sex offender. He was later transferred to state prison because he was found to be dangerous and unamenable to treatment. Petitioner was again sentenced to prison for a sexual attack on a 14-year-old boy in 1975. Evidence was

also admitted that he was responsible for four sex-related killings that occurred in Orange County from late 1979 through early 1980.

Petitioner did not testify, but he presented mitigating evidence that he was sodomized as a young boy, had family problems caused by a father who drank and gambled and that the onset of his violent, nonconsensual homosexual activities occurred during his tour of duty in Vietnam. His family testified that his character had changed following his return from Vietnam and they proclaimed that he was a good person known for his good deeds. A psychologist testified that petitioner could function and be productive in a prison-type setting, and only in such a setting.

C. Raising of Federal Questions

1. Conflicts with Counsel

After fourteen months of being represented by appointed counsel Earl Hanson, petitioner, an indigent, moved on the eve of trial to substitute William T. Charvet in as retained counsel. Although the prosecution put the court on notice that the retainer arrangement between petitioner and Charvet likely involved a literary rights contract, and thus presented a conflict of interest, the court never made an adequate inquiry into the matter either to ascertain the facts or to determine whether petitioner was aware of the facts and their significance.

Moreover, the court allowed Charvet to represent petitioner even though the prosecution argued, and the court expressly found, that a conflict of interest between petitioner and Charvet existed because of Charvet's prior dealings with James Munro, a key prosecution witness and petitioner's accomplice. Despite its finding that a conflict existed, the court never advised petitioner of the potential dangers of such a conflict and never solicited

from him a waiver of his right to representation by conflict-free counsel.

The California Supreme Court held that although the prosecution objected to Charvet's substitution on the grounds that the fee likely included a literary-rights agreement that created a conflict of interest between petitioner and his attorney Charvet, there was no reversible error because the trial court was under no duty to inquire as to the existence of the potential conflict: "The [trial] court cannot be deemed to have known, or to have had reason to know, of the possibility of a conflict in this regard. In our view, a court can be held to have knowledge or notice of the possibility of a conflict only when, as in Wood [v. Georgia, 450 U.S. 261 (1981)] itself (450 U.S. at p. 266), it is provided with evidence of the existence of a conflict situation -- a circumstance not present here." (47 Cal.3d at p.838.)

Further, even though it recognized that the trial court committed error by failing to obtain petitioner's waiver of conlict-free counsel, due to Charvet's attorney-client relationship with Munro, a majority of the court held that reversal was not required because petitioner "has not shown, and cannot show, any adverse effect on counsel's performance resulting [from the conflict]." (47 Cal.3d at p. 843.)

In his dissenting opinion, Justice Broussard disagreed with the majority on both points and opined that "the court had a duty to deny [petitioner's] motion for substitution of counsel burdened with such conflicts of interest." (47 Cal.3d at p. 858.)

2. Booth Error

In his closing argument the prosecutor encouraged the jury to consider as a nonstatutory factor in aggravation

the impact of petitioner's crimes upon the families of the victims. (RT 5492-5493.)

The California Supreme Court rejected petitioner's assignment of error because there was no specific "victim-impact" evidence. (47 Cal.3d 808, 849.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because,

-- within Rule 17.1(c), the California Supreme Court has "decided a federal question in a way in conflict with applicable decisions of this Court" [namely, Wood v. Georgia, 450 U.S. 261, 271 (1981); Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942); and Cuyler v. Sullivan, 446 U.S. 335, 345 (1980)], and

-- within Rule 17.1(c), the California Supreme Court has "decided an important question of federal law which has not been, but should be, settled by this Court," [namely, whether the prosecutor's argument -- that the jury consider, as a non-statutory aggravating factor, the impact of capital crimes upon the victim's families -- violates the established principles of Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987).

ARGUMENT

I

CONFLICTS OF INTEREST BETWEEN PETITIONER AND HIS TRIAL ATTORNEYS DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL

In September 1981, several days before trial was scheduled to commence and some thirteen months after multiple murder charges were filed against him, petitioner moved to substitute the law firm of Charvet & Stewart as his retained counsel. The prosecution objected to the motion, in part because: (1) pretrial dealings between Charvet & Stewart and James Munro, petitioner's alleged accomplice,

created a conflict of interest with petitioner; and (2) the retainer agreement between petitioner and Charvet likely involved book rights (petitioner's sole asset), and created an additional conflict of interest.

Charvet denied the existence of an attorney-client relationship with Munro. He also, despite the prosecuter's request to do so, refused to give the court any information on his fee agreement with petitioner.

The court initially denied petitioner's motion to substitute counsel, in part, because it found there was an actual conflict between petitioner and the Charvet & Stewart team due to that firm's contacts with Munro. Later, the trial court reversed its ruling and allowed Charvet to substitute in the day trial commenced.

Under the Sixth and Fourteenth Amendments to the United States Constitution the right to effective assistance of counsel includes the "correlative right to representation that is free from conflicts of interest." (Wood v. Georgia, 450 U.S. 261, 271 (1981).) Petitioner was never advised of the consequences of being represented by an attorney with either such conflict, nor, did he ever waive the right to conflict-free representation.

A. Literary-Rights Conflict

The prosecutor objected to Charvet's substitution on the ground that the retainer agreement likely included a literary-rights agreement that created a conflict between petitioner and Charvet. Yet, the majority of the California Supreme Court held that there was no reversible error because the trial court was under no duty to inquire. The majority cited Wood v. Georgia, supra, 450 U.S. at p. 272, and Holloway v. Arkansas, supra, 435 U.S. at p. 484, for the proposition that: "When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry"

(47 Cal.3d at p. 836). The court concluded that: "The [trial] court cannot be deemed to have known, or to have had reason to know, of the possibility of a conflict in this regard. In our view, a court can be held to have knowledge or notice of the possibility of a conflict only when, as in Wood itself (450 U.S. at p. 266), it is provided with evidence of the existence of a conflict situation -- a circumstance not present here." (Id. at p. 838.)

Wood holds the duty of inquiry is triggered whenever there is an "appearance" or "suggestion" of a conflict. (Wood, supra, 450 U.S at pp. 272-273.) The majority imply that there was strong evidence of a conflict in Wood, evidence that was different and stronger than present herein (47 Cal.3d at p. 266). That simply is not the case. The "appearance" or "suggestion" of the potential conflict in Wood was latent in the proceedings, there was no independent evidence of a conflict as the majority imply, and as they would require of petitioner. In Wood, the defendants, who had been convicted of selling lewd materials and given heavy fines, had their probations revoked for failing to pay their fines. The court was aware that their attorney had been hired by their employer, and that they believed the employer would pay their fines. The "evidence" of the potential conflict was that at their revocation hearing, the attorney leveled a constitutional attack against their convictions rather than requesting leniency.

The majority found that the duty to inquire under Wood was not triggered because the evidence of a literary rights contract amounted only to "conjecture" or "speculation." (47 Cal.3d at p. 838.) That conclusion dodges the clear holding of Wood. Petitioner, although indigent, had retained private counsel on the very eve of trial in a massive, notorious death penalty case, and although requested to do so by both the prosecutor and the trial court, counsel refused to divulge whether or not the

fee agreement included a book-rights contract. (Ibid.) This evidence of a conflict is as strong, if not stronger, than in Wood. The appearance of private counsel under these circumstances certainly is "evidence" that "suggested" a literary-rights type fee agreement was involved, especially when counsel argued that this Court would approve of such an arrangement "if a person's only asset that he had in the whole world was a book right . . . ." (RT A-123-A-124.) Moreover, the prosecutor herin objected to the substitution; therefore, as in Wood, "Any doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and requested that the court look into it." (Wood, supra, 450 U.S. at p. 272-273.)

As Justice Broussard explained in his concurring and dissenting opinion: "when we come to the application of the law to the facts, the majority stumble and fall. Under established principles of law [citations omitted], defendant's convictions must be vacated and remanded for a determination (1) whether a literary-rights agreement actually existed and (2) whether there was an actual conflict of interest arising from such agreement . . . adversely affecting counsel's performance . . . ." (47 Cal.3d at p. 858.)

B. Actual Conflict With Munro

The California Supreme Court acknowledged that an attorney-client relationship existed between Charvet's firm and petitioner's accomplice Munro, and recognized that the trial court erred by failing "to obtain . . . a waiver of [petitioner's] constitutional right to the assistance of conflict-free counsel." (47 Cal.3d 808, 839.) However, the majority incorrectly held that reversal was not required because petitioner "ha[d] not shown, and [could not] show, any adverse effect on counsel's performance resulting [from

the conflict]." (Id. at p. 843.) The court believed that Charvet's cross-examination of Munro was so broad and deep that it precluded "even [the] conjecture [of] any failing on Charvet's part that could be attributed to any information he or his partner Stewart could conceivably have received from Munro . . . ." (Ibid.) The court's conclusion is in error: automatic reversal is required. The requirement that a defendant show adverse affect was established in Cuyler v. Sullivan, supra, 446 U.S. at page 335; however, such a showing is required only where, unlike here, no objection was raised at trial. (Id., at p. 348.)

This Court has long held that a defendant who, over objection, is required to be represented by the same attorney as one of his codefendants, is denied the "right to have the effective assistance of counsel." (Glasser v. United States, 315 U.S. 60, 76 (1942).) This position was strengthened in Holloway v. Arkansas, 435 U.S 475 (1978), where Glasser was interpreted "as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic." (Id. at p. 488, emphasis added.) It is clear that the prosecutor's objection here satisfied the "timely objection" requirement. (Cuyler v. Sullivan, 446 U.S. 335 (1980).) That objection, coupled with the trial court's finding of an actual conflict, and the state Supreme Court's acknowledgment of an attorney-client relationship between Charvet's firm and Munro mandates automatic reversal under Glasser and Holloway.

II

THE PROSECUTOR'S ARGUMENT VIOLATED THE PRINCIPLES ESTABLISHED IN BOOTH V. MARYLAND

At petitioner's penalty trial, the prosecutor argued that the impact of petitioner's crimes upon the

victims' families should be considered by the jury as a nonstatutory aggravating factor. (RT 5492-5493.)[2]

This Court, in Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987), reversed a death judgment on similar grounds because a statutory Victim Impact Statement (VIS) had been admitted at the penalty phase of a capital trial. It was held that the admission of the VIS violated the

---

2 "Now, I have talked about the victims, and certainly when we start talking about the aggravating circumstances it certainly is aggravating and an aggravating circumstance to those 10 or 14 or 22 young men who lost their life. They will never experience life in any way.

"And that you cannot really comprehend what that means in terms of losing your life or your life certainly at that age.

"But there is another consideration that we can talk about here in the penalty phase, another aggravating circumstance.

"What that is is what those 10 or 14 or 22 young men, what their death has meant to their families, to their families who will never be the same again. Ever. Ever again.

"They are living. And they are from this community. They have suffered over the death of their sons at the time and forever.

"That is a consideration that you have to consider with Mr. Bonin. He knows what he is doing. It's not just the victim that's involved. He's killing a living, breathing person who has a mother, a father and has friends.

"That is an aggravating circumstance that can only be called, only call for the penalty of death.

"When we talk about an aggravating circumstance, I would know if I stood as a parent there would be something to lose somebody, an accident, disease of a child. That would be something.

"But to understand that your son, your son who you raised, had to die at the hands of a man like Bonin in the manner that Bonin did would be just something I'm not sure I could take or anybody could take.

"They know the binding, the sodomy and the dumping, the throwing of that body, the ending of that life. That is an aggravating circumstance that will never go away.

"Again it's an aggravating circumstance that would only call for the penalty of death." (RT 5491-5493.)

Eighth Amendment because the evidence contained in the VIS was not relevant to the decision between life or death, and it created the risk that death might be imposed in an arbitrary and capricious manner.

The VIS in Booth was prepared by the probation department and contained two types of information: (1) personal characteristics of the victims and the emotional impact of the crimes on the victim's family; and (2) family members feelings about the defendant and the crimes he committed.

The State argued that the emotional impact of the crimes upon the victim's family and the personal characteristics of the victim were both circumstances of the crime because there was a forseeable link between the crimes and the harm to the surviving family members; thus consideration of those factors was not "arbitrary" but rather enabled the jury to better asses the "aggravating quality" of the crime.

This Court in Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983) noted that a capital jury's sentencing decision must be an "individualized determination" based on "the character of the individual and the circumstances of the crime." (Id. at p. 879.) The VIS in Booth violated that notion for it did not properly focus on the defendant, but rather on the character of the victim and the effect of the crime on his family, both factors that "may be wholly unrelated to the blameworthiness of a particular defendant." (Booth, supra, 482 U.S. at p. ___, 96 L.Ed.2d at p. 449.)

The prosecutor's argument to the jury herein that the emotional trauma experienced by the victims' families should be considered in the life/death calculus creates the same dangers as the VIS did in Booth, and it likewise suffers from the same constitutional infirmity: it "divert[s] the jury's attention away from the defendant's background and the circumstances of the crime." (482 U.S. at p. ___, 96 L.Ed.2d at p. 450.)

The second type of information in the VIS, the family member's feelings about the defendant and the crime, violates Justice Stevens' caveat that the sentencing decision of the jury in a capital case must "be, and appear to be, based on reason rather than caprice and emotion." (Gardner v. Florida, 430 U.S. 349, 358, 51 L.Ed.2d 393 (1977).) The feelings of family members about the defendant and the crime "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." (482 U.S. at p. ___, 96 L.ED.2d at p. 452.)

The instant case presents the same danger: not only was there the potential to inflame, but the prosecutor's encouragement to the jury to speculate upon the impact the murders had on the victim's families was a clear attempt to fan the flames. This speculation is potentially more diverting than the actual "victim-impact" evidence present in Booth itself. Simply because the family members did not specifically so-testify in no way mitigates that danger. It appears obvious that the only reason the prosecutor could have had for his argument was to appeal to the passion of the jury by engendering its sympathy for the victims' parents and family members.

Like the admission of the VIS in Booth, the prosecutor's argument to the jury herein to consider the impact of the emotional trauma suffered by the victims' families "clearly is inconsistant with the reasoned decision making we require in capital cases." (482 U.S. at p. ___, 96 L.Ed.2d at p. 452.)

CONCLUSION

For the reasons expressed above, petitioner respectfully requests that the petition for writ of certiorari be granted.

Dated this 30th day May 1989, at Los Angeles, California.

Respectfully submitted,

OFFICE OF THE
STATE PUBLIC DEFENDER

WILLIAM DEAN FREEMAN
Deputy State Public Defender

Attorneys for Petitioner

NO. 88 - 88-7381

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM GEORGE BONIN, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

MOTION FOR LEAVE TO PROCEED IN PETITION
FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

The petitioner, WILLIAM GEORGE BONIN, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of California, without prepayment of costs and to proceed in forma pauperis pursuant to rule 46 of the United States Supreme Court Rules and 28 USC 1915(a).

Petitioner was indigent in the California Supreme Court below and the California State Public Defender was appointed as counsel. He was committed to the California

/ / / / /

/ / / / /

/ / / / /

Department of Corrections and is presently awaiting execution of a death sentence.

Due to petitioner's incarceration on death row, he has been unable to have his affadavit supporting in forma pauperis status properly notarized. Therefore, to establish petitioner's indigency and eligibility to proceed in forma pauperis, a copy of the order of the California Supreme Court appointing the Office of the State Public Defender to represent petitioner on the appeal of his conviction and death sentence is attached hereto as exhibit A.

In addition, although not notarized, petitioner's affadavit likewise follows.

Respectfully submitted,

OFFICE OF THE
STATE PUBLIC DEFENDER

By William Dean Freeman
WILLIAM DEAN FREEMAN
Deputy State Public Defender

Member of the Supreme Court
of the United States

Attorneys for Petitioner

NO. 88 - 88-7381

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM GEORGE BONIN, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON WRIT OF CERTIORARI IN FORMA PAUPERIS

I, WILLIAM GEORGE BONIN, first being duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I am presently a state prisoner incarcerated at the California Department of Corrections facility at San Quentin State Prison in Tamal, California, under a sentence of death.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of these proceedings are true.

1. Are you presently employed? NO.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? no. If yes, state amount ($_____).

3. Do you own any cash or checking or savings account? no. If yes, state appropriate current balance ($_____).

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no. If yes, describe (_____

_____

_____)

5. List the persons who are dependent upon you for support and state your relationship to those persons. If none, so indicate (none).

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William George Bonin
WILLIAM GEORGE BONIN

Duly witnessed and sworn to before me, a Notary Public, this _____ day of _____, 1989.

_____
NOTARY PUBLIC (or other notary notation)

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
JUSTICE

Crim. Nos. 22530 and 23286

SUPREME COURT
FILED
JUL 13 1984
LAURENCE P. GILL, Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

WILLIAM G. BONIN

Upon request of appellant for appointment of counsel the Office of the State Public Defender is hereby appointed to represent appellant on his automatic appeals now pending in this court.

I, Robert F. [illegible], Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.
Witness my hand and the seal of the Court this 23rd day of May A.D. 1989
By [illegible] Clerk
Deputy Clerk

BIRD, C. J.
Chief Justice

EXHIBIT A

APPENDIX

[No. S004440. Crim. No. 22530. Jan. 9, 1989.]

THE PEOPLE, Plaintiff and Respondent, v.
WILLIAM GEORGE BONIN, Defendant and Appellant.

SUMMARY

In a prosecution for multiple sexually related murders and other felonies involving the victims, the jury convicted defendant of murder and imposed a sentence of death. As to each murder, it found true a multiple-murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) and, with the exception of three counts, a felony-murder-robbery special circumstance (Pen. Code, § 190.2, subd. (a)(17)(i)). Defendant was provided with appointed counsel, but moved before trial to substitute in private counsel of his own choice. The trial court held, upon the prosecutor's objection, that the proposed new defense counsel had a conflict of interest consisting of prior dealings with an alleged accomplice of defendant arising out of the same incident. Ultimately, however, it permitted the substitution. At trial, the court permitted the victims' parents to testify regarding matters to which the defense was willing to stipulate. (Superior Court of Los Angeles County, No. A 360975, William B. Keene, Judge.)

On defendant's automatic appeal (Pen. Code, § 1239, subd. (b)), the Supreme Court set aside all but one of the multiple-murder special-circumstance findings, holding that duplicative use of them was improper, but in all other respects affirmed the judgment. It held that the trial court erred in permitting substitution of conflicted counsel without first obtaining the constitutionally required waiver by defendant. However, it held, that error was not reversible in the absence of a showing of any adverse effect on counsel's performance resulting from the conflict. It also held that the admission of the testimony of the victim's parents, though error, was not reversible since it contained no "victim impact" evidence, and that the trial court's instructions on special circumstances and sentencing factors either were not erroneous or constituted harmless error. (Opinion by Mosk, J., with Lucas, C. J., and Panelli, Arguelles, Eagleson, and Kaufman, JJ., concurring. Separate concurring and dissenting opinion by Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Criminal Law § 77—Rights of Accused—Aid of Counsel.**—Under both U.S. Const., 6th Amend., as applied to the states through the due process clause of U.S. Const., 14th Amend., and Cal. Const., art. I, § 15, a defendant in a criminal case has a right to the assistance of counsel.

(2) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict-free Counsel.**—The constitutional right to counsel in criminal cases entitles the defendant, not to some bare assistance, but rather to effective assistance. Included in the right to the effective assistance of counsel is a correlative right to representation that is free from conflicts of interest.

(3) **Criminal Law § 82—Rights of Accused—Aid of Counsel—Defendant's Right of Selection—Focus on Adversary.**—Claims of right to counsel under U.S. Const., 6th Amend., appropriately focus on the adversarial process, not on the accused's relationship with his lawyer. Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim is to guaranty an effective advocate, rather than to ensure that a defendant will be represented by the lawyer whom he prefers.

(4) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Retained or Appointed Counsel.**—The constitutional guarantee of effective assistance of counsel protects the defendant who retains his own counsel to the same degree and in the same manner as it protects the defendant for whom counsel is appointed, and recognizes no distinction between the two.

(5) **Criminal Law § 654—Appellate Review—Reversible Error—Counsel—Effective Assistance—Fundamental Right.**—The right of effective assistance of counsel is fundamental, and is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.

(6) **Attorneys at Law § 15—Attorney-client Relationship—Conflict of Interest and Remedies of Former Clients.**—Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. Included are circumstances in which one attorney represents more than one defendant in the same criminal proceeding, situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter, and situations in which an attorney undertakes representation of a defendant in exchange for the literary rights to a portrayal or account based on information relating to the representation.

(7) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Trial Court's Duties of Inquiry and Response.**—In order to safeguard a criminal defendant's constitutional right to the assistance of conflict-free counsel, the trial court is required to make inquiry into the matter whenever it knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel. It is further obligated to respond to what its inquiry discovers, acting with a caution increasing in degree as the offenses dealt with increase in gravity.

(8) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Waiver by Defendant.**—After the trial court in a criminal case has fulfilled its obligations to inquire into the possibility of a conflict of interest between defendant and his counsel, and to act in response to what its inquiry discovers, the defendant may choose the course he wishes to take. If a conflict of interest is possible, the defendant may decline or discharge conflicted counsel. But he may also choose not to do so; a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.

(9) **Criminal Law § 51—Rights of Accused—Fair Trial—Waiver—Prerequisites.**—To be valid, waivers of constitutional rights must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences, and must be unambiguous and without strings.

(10) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Waiver by Defendant—Trial Court's Inquiry.**—Before the trial court accepts a criminal defendant's waiver of attorney conflict of interest, it need not undertake any particular form of inquiry, but at a minimum must assure itself that defendant has discussed with his attorney or outside counsel the potential drawbacks of potentially conflicted representation, that he has been made aware of the dangers and possible consequences of such representation in his case, that he knows of his rights to conflict-free representation, and that he voluntarily wishes to waive that right.

(11a, 11b) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Trial Court's Failure to Fulfill Duties of Inquiry and Response—Reversible Error.**—A trial court in a criminal case errs when it fails to fulfill its duty to inquire into the possibility of a conflict of interest on the part of defense counsel, or fails to adequately act in response to what its inquiry discovers. Such error is not automatically reversible, but to obtain reversal, the defendant need not demonstrate specific, outcome-determinative prejudice. He need show only that an actual conflict of interest existed and that the conflict adversely affected counsel's performance.

(12) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Trial Court's Inquiry and Response—Literary Rights Fee Agreement.**—In a prosecution for multiple murders and related offenses, the trial court did not fail to satisfy its constitutionally required inquiry into alleged attorney conflict of interest based on a literary rights fee agreement between defendant and his chosen counsel, where the court had no reason to know of the possibility of a conflict in that regard. Although matters raised in the trial court's hearing on the matter of substitution of counsel might have laid a basis for speculation regarding the existence of such an arrangement, they did not amount to evidence sufficient to trigger the duty of inquiry. A court can be held to have knowledge or notice of the possibility of a conflict only when it is provided with evidence of its existence, not mere conjecture.

(13a, 13b) **Criminal Law § 102—Rights of Accused—Competence of Defense Counsel—Codefendants—Conflict of Interest—Trial Court's Failure to Discharge Duties of Inquiry and Response.**—In a prosecution for multiple murders and related felonies, the trial court failed to discharge its duties of inquiry and response regarding a possible conflict of interest burdening defendant's chosen counsel, arising from the firm's former attorney-client relationship with an accomplice who was permitted to plea-bargain in exchange for testimony. Although the court initially inquired into the matter and denied defendant's motion to substitute in chosen counsel for his court-appointed counsel due to the threat of conflict, it thereafter nullified its actions on the first day of trial by nonetheless ordering the substitution without making any attempt to obtain from defendant a waiver of his constitutional right to the assistance of conflict-free counsel.

[See Cal.Jur.3d (Rev), Criminal Law, § 2181; Am.Jur.2d, Criminal Law, § 984 et seq.]

(14) **Criminal Law § 361—Appellate Review—Preserving and Reserving Objections—Ineffective Defense—Defense Counsel's Conflict of Interest—Trial Court's Failure to Inquire and Respond.**—A criminal defendant who has not made an objection below is not prohibited from raising on review a claim of a constitutional violation based on the trial court's failure to properly inquire and respond to a potential conflict of interest on the part of defense counsel. So long as the trial court knew, or reasonably should have known, of the possibility of a conflict of interest, it is immaterial whether or not the defendant made any objection.

(15) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Trial Court's Duty to Inquire and Respond—Issue Raised by Prosecution.**—Whether or not the prosecution withdrew its objection, based on potential conflict of interest, to defendant's proposed substituted counsel was immaterial to the issue whether the trial court committed error in failing to adequately inquire into and respond to the potential conflict. Although it was the prosecution's objection which triggered the court's duty to inquire, its withdrawal of the objection could not release the court from its obligation to complete the task imposed on it by law.

(16a, 16b) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Conflict of Interest—Waiver by Defendant—Circumstances Not Constituting.**—In a prosecution for multiple murders and related felonies, defendant could not be deemed to have waived his constitutional right to the assistance of conflict-free counsel, where, notwithstanding the fact that he was present at relevant hearings at which the matter was discussed and never raised any objection, defendant never purported to make a personal, on-the-record waiver, nor was there any on-the-record advisement to him of the possible dangers and consequences of conflicted representation.

(17) **Criminal Law § 608—Appellate Review—Scope—Presumptions and Inferences—Waiver of Constitutional Rights—Effective Assistance of Counsel.**—A reviewing court indulges every reasonable presumption against a criminal defendant's waiver of unimpaired assistance of counsel.

(18) **Criminal Law § 555—Appellate Review—Estoppel to Raise Error—Ineffective Assistance of Counsel Based on Conflict of Interest—Defendant's Motion for Substitution in of Conflicted Counsel.**—In a death penalty prosecution for multiple murders and related felonies, defendant was not precluded from raising on appeal any error the trial

court may have committed in permitting, without the requisite constitutional safeguards, the substitution in on defendant's own motion of potentially conflicted counsel for defendant's court-appointed counsel. Notwithstanding the prosecution's assertions that defendant made the motion for purposes of delay and prejudice to the People's case, other motives could be inferred. In any event, defendant's motives did not compel the trial court to act in error, and defendant could not be held responsible for it.

(19) **Courts § 45—Doctrine of Stare Decisis—Obiter Dicta—Inconsistency Between Court's Words and Actions.**—Language of the U.S. Supreme Court that is at odds with its actions must be considered dictum. Therefore, when faced with an inconsistency between what the Supreme Court says and what it does, lower courts must follow as binding authority its actions and not its words.

(20) **Criminal Law § 654—Appellate Review—Harmless Error—Counsel—Effectiveness of Defense Counsel—Conflict of Interest.**—Although the trial court, in a prosecution for multiple murders and related offenses, erred in permitting defendant to substitute in counsel burdened by a conflict of interest arising out of the law firm's contacts with a key prosecution witness, the error was not reversible. Counsel's cross-examination attack on the prosecution witness's credibility was broad and deep, and defendant could not show any adverse effect on counsel's performance arising from the alleged conflict.

(21) **Criminal Law § 101—Rights of Accused—Competence of Defense Counsel—Substituted Counsel—Time for Preparation.**—In a prosecution for multiple sex-related murders and other felonies, ineffective assistance of defense counsel was not presumed based on the fact that defendant's substituted counsel was given only 30 days to prepare for trial of the multiple and grave charges. Defendant's earlier-appointed counsel, who was ready for trial on the date of substitution, offered to and did help defendant's substituted counsel, and, although substituted counsel stated he would be more comfortable with further time to prepare, he answered ready at trial.

(22a, 22b) **Homicide § 72—Testimony by Accomplices in Exchange for Plea Bargain—Trial Court's Refusal to Bar Testimony.**—In a death penalty prosecution for multiple murders and related felonies, the trial court did not err by refusing to bar two accomplices from testifying against defendant in exchange for plea-bargained leniency, on the asserted ground that the prosecution obtained the agreement of each man to testify by using defendant's tape-recorded statements incriminating them in violation of its promise not to use such statements for any purpose other than determining whether to plea-bargain with defendant. Although the prosecution did make such a promise, it was required, over its objections, to disclose the content of the tape recordings pursuant to a discovery request made by each accomplice's counsel. Accordingly, the prosecution did not exploit defendant's statements for the purpose of obtaining the accomplices' testimony.

(23) **Criminal Law § 569—Appellate Review—Preserving and Reserving Objections—Evidence at Trial—Admissions.**—To preserve for appeal a claim that a defendant's constitutional rights regarding statements was violated, the defendant must make an objection below on those grounds.

(24a, 24b) **Criminal Law § 408—Evidence—Admissibility—Expert Witnesses—Subjects of Expert Testimony—Experimental Evidence—Inadequate Foundation.**—In a prosecution for multiple sexual murders and related felonies, the trial court erred in admitting, over defense counsel's objection, the testimony of a prosecution criminalist concerning an experiment conducted to determine whether ligature marks on a victim's body could have been made as an accomplice testified. The court failed to obtain from the prosecution the requisite foundational evidence regarding similarity of conditions, and the criminalist essentially conceded that he was unqualified to conduct the experiment.

(25) **Criminal Law § 408—Evidence—Admissibility—Subjects of Expert Testimony—Experimental Evidence—Foundation.**—Admissibility of experimental evidence depends upon foundational proof that the experiment is relevant, that it was conducted under substantially similar circumstances as those of the actual occurrence, and that evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury. The burden of proof in establishing the essential fact of similarity of conditions is whether the conditions were substantially identical, not absolutely identical.

(26) **Criminal Law § 409—Admissibility—Opinion Evidence—Expert Witnesses—Qualifications—Experimental Evidence.**—In addition to the foundational prerequisites regarding the conduct of the experiment itself, admissibility of experimental evidence also depends on proof, with some particularity, of the qualifications of the individual testifying concerning the experimentation.

(27) **Criminal Law § 408—Admissibility—Opinion Evidence—Expert Witnesses—Subjects of Expert Testimony—Experimental Evi-**

dence—Burden of Proof.—The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation.

(28) Criminal Law § 687—Appellate Review—Harmless Error—Experimental Evidence.—In a prosecution for multiple sexual murders and related offenses, the trial court's error in admitting without the requisite foundation the testimony of a prosecution criminalist concerning an experiment conducted to determine whether ligature marks on a victim's body could have been made as an accomplice testified, was not prejudicial. There was no reasonable probability that it had any marginal effect on the outcome, since the properly admitted evidence supporting guilt was strong, and it did not affect the balance of inculpatory and exculpatory evidence.

(29a, 29b) Homicide § 108—Appeal—Harmless Error—Admission of Evidence—Testimony of Victims' Parents—Offered Stipulation.—Although the trial court, in a prosecution for multiple sexually related murders, erred by admitting testimony of the victims' parents regarding matters as to which defendant offered to stipulate, the error was harmless, since the improperly admitted testimony was not accompanied by any "victim impact" evidence. Thus, it had no potential to inflame the jurors and could not have exposed defendant to prejudice.

(30) Criminal Law § 286—Evidence—Admissibility—Relevance—Stipulated Elements.—If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evid. Code, §§ 210, 350. If a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence to prove that element to the jury. The court should compel the prosecution to accept the defense's offer, and bar it from eliciting testimony on the facts covered by a proposed stipulation.

(31) Witnesses § 279—Evidence—Presumptions and Inferences—Inherent Suspicion of Informer's Testimony—Duty to Instruct Sua Sponte.—In a prosecution for multiple sexually related murders, the trial court did not err by failing to instruct the jurors sua sponte that they should consider an informer's testimony to be inherently unreliable and should view such testimony with suspicion.

(32) Homicide § 85—Instructions—Felony Murder—Special Circumstances—Intent to Kill.—In a death penalty prosecution for multiple sexual murders and related felonies, the trial court did not err in

failing to instruct on intent to kill with regard to felony-murder special circumstances, where all the evidence showed that defendant either actually killed the victims or was not involved in the crimes at all. An instruction on intent to kill as an element of felony-murder special circumstances is required when the jury could find that the defendant was an aider and abettor, rather than the actual killer.

(33a-33c) Homicide § 66—Evidence—Sufficiency—Felony Murder—Special Circumstances.—In a death penalty prosecution for multiple sexually related murders and other felonies, there was sufficient evidence for a rational trier of fact to find the independent felonious purpose element of each felony-murder special circumstance beyond a reasonable doubt, where, in each case, one could infer that defendant committed the acts resulting in the deaths in order to steal.

(34) Homicide § 97—Felony-murder Special Circumstance—Independent Felonious Purpose.—Felony-murder special circumstances require that the trier of fact find that the defendant committed the act resulting in death in order to advance an independent felonious purpose.

(35) Criminal Law § 625—Appellate Review—Scope—Sufficiency of Evidence—When Viewed in Light Most Favorable to People.—In reviewing the sufficiency of evidence, the question asked by the appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.

(36) Homicide § 75—Instructions—Applicability to Facts and Evidence—Multiple-murder Special Circumstances—Intent to Kill.—In a prosecution for multiple sexually related murders, the trial court did not err in failing to instruct on intent to kill with regard to multiple-murder special circumstances, where there was no evidence from which the jury could find that defendant was an aider and abettor rather than the actual killer.

(37) Homicide § 97—Duplicate Multiple-murder Special Circumstance Allegations.—In a death penalty prosecution for multiple sexually related murders, it was error for the prosecution to allege more than one multiple-murder special circumstance. Accordingly, defendant was entitled to vacation of nine of the ten multiple-murder special-circumstance findings made by the jury.

(38) Homicide § 108—Appeal—Harmless Error—Guilt Phase Testimony by Parents of Victims—Admission at Penalty Phase.—Although the

trial court, in a prosecution for multiple sexually related murders, erred in admitting at the penalty phase testimony by the victims' parents that had been erroneously admitted at the guilt phase, the error was not reversible. The testimony did not include any "victim impact" evidence. Thus, it had no potential to inflame a reasonable juror and could not have exposed defendant to prejudice.

(39) **Criminal Law § 98—Rights of Accused—Fair Trial—Remaining Silent—Alleged Infringement of Right—Admission of Evidence Relating to Separate Prosecution Pending in Other Court.**—In a death penalty prosecution for multiple murders and related felonies, the trial court did not err in allowing the admission of evidence of other murders for which defendant was to be tried in another county. Neither the state nor federal constitutional privilege against self-incrimination was improperly infringed on the asserted ground that defendant was compelled to surrender it and reveal his defense in the other action in order to present a defense to the evidence in the penalty phase of the instant action.

(40) **Homicide § 99—Instructions on Sentencing Factors.**—In a death penalty prosecution for multiple sexually related murders and other felonies, the trial court did not err by instructing on all the statutory sentencing factors (Pen. Code, § 190.3), without deleting such factors as were inapplicable on the facts of the case.

(41) **Homicide § 110—Appeal—Harmless Error—Instructions—Death Penalty—Sentencing Factors—Duplicate Multiple-murder Special Circumstance Findings.**—Although the trial court, in a prosecution for multiple sexually related murders, erred in giving an instruction at the penalty phase effectively directing the jurors to consider duplicative multiple-murder special-circumstance findings instead of one, the error was not reversible. Reviewing the record of the penalty phase in its entirety, there was no reasonable possibility that the error had any marginal effect on the balance of aggravating and mitigating evidence or on the consequent determination of the appropriateness of death.

(42) **Homicide § 99—Sentencing Factors—Other Crimes.**—The scope of Pen. Code, § 190.3, factor (b) (presence or absence of criminal activity by defendant), must be limited to crimes other than those of which the defendant was convicted in the capital proceeding.

(43) **Homicide § 99—Sentencing Factors—Age of Defendant.**—A homicide defendant's age at the time of the crime (Pen. Code, § 190.3, factor (i)) may be considered in aggravation as well as in mitigation.

(44) **Homicide § 99—Sentencing Factors—Circumstances of Crime.**—Although the trial court's instruction on statutory mitigating and aggravating circumstances in a death penalty prosecution was potentially misleading by failing to advise the jury to consider the circumstances and background of the criminal as well as of the crime, it did not actually mislead the jury, where both the prosecutor and defense counsel told the jurors in argument they could consider circumstances of defendant's background, and weigh it in mitigation of the penalty of death.

(45) **Homicide § 96—Sympathy Instruction—Failure to Instruct Sua Sponte.**—In a death penalty prosecution for multiple murders and related felonies, the trial court was under no obligation to amplify or explain its instruction to consider sympathy in choosing the appropriate penalty, in the absence of a request from defendant that it do so.

(46) **Homicide § 96—Instructions—Jury's Sentencing Discretion.**—In a death penalty prosecution for multiple murders and related felonies, the jurors were not misled to defendant's prejudice by a pattern instruction incorporating the mandatory sentencing language of Pen. Code, § 190.3. Both the prosecutor and defense counsel called on the jurors to make their penalty determination as a moral assessment of defendant's personal culpability, and neither "counted" the sentencing factors or referred in any way to the mandatory sentencing language.

(47) **Homicide § 96—Instructions—Death Penalty—Burden of Proof in Determining Penalty—Due Process.**—The due process clause does not require that a court instruct jurors sua sponte in a death penalty prosecution that they may return a verdict of death only if they are persuaded beyond a reasonable doubt that the evidence in aggravation outweighs the evidence in mitigation, and that death is the appropriate penalty.

(48a, 48b) **Homicide § 101—Death Penalty—Constitutionality.**—The 1978 death penalty law (Pen. Code, § 190.1 et seq.) is not unconstitutional.

(49) **Homicide § 101—Death Penalty—Cruel and Unusual Punishment.**—In a prosecution for multiple sexually-related murders and related felonies, the imposition of the death penalty on defendant did not violate of U.S. Const., 8th Amend. In view of the theories presented and the evidence introduced, the jury's guilt phase verdicts implied findings, amply supported by the evidence, that defendant actually killed, and intended to kill, his victims.

COUNSEL

Frank O. Bell, Jr., under appointment by the Supreme Court, and Monica Knox, Chief Assistant Public Defender, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Michael D. Wellington and Steven H. Zieglen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MOSK, J.—This is an automatic appeal from a judgment of death (Pen. Code, § 1239, subd. (b)) imposed under the 1978 death penalty law (*id.*, § 190.1 et seq.).

In an information filed on January 2, 1981, defendant was charged with the murder of Donald Hyden, David Murillo, Robert Wirostek, Daris Lee Kendrick, Sean King, "John Doe," Marcus Grabs, Thomas Lundgren, Charles Miranda, James Macabe, Ronald Gatlin, Harry Todd Turner, Steven Wood, and Steven Wells. (Pen. Code, § 187.) He was also charged with robbing all of the above-named persons with the exception of Wirostek, King, and "John Doe" (*id.*, § 211); with sodomizing Grabs (*id.*, § 286, subds. (b)(1), (c)); and with committing mayhem on Lundgren (*id.*, § 203). The information contained numerous allegations. For example, as to each murder count a multiple-murder special circumstance was alleged (*id.*, § 190.2, subd. (a)(3)); as to each, with the exception of the counts involving Wirostek, King, and "John Doe," a felony-murder-robbery special circumstance was also alleged (*id.*, § 190.2, subd. (a)(17)(i)); and as to the count involving Grabs a felony-murder-sodomy special circumstance was alleged (*id.*, § 190.2, subd. (a)(17)(iv)). Defendant pleaded not guilty and denied the allegations. Subsequently, the counts charging the murder of Wirostek and "John Doe" were dismissed pursuant to Penal Code section 995.

On October 19, 1981, trial by jury commenced. Defendant was acquitted of murdering King and Lundgren, of sodomizing Grabs, and of committing mayhem on Lundgren, but was otherwise found guilty as charged. With the exception of the felony-murder-sodomy special-circumstance allegation, all the special circumstance allegations were found true. Defendant received the penalty of death for each of the 10 murder convictions.

As we shall explain, we conclude that except as to the "multiple" multiple-murder special-circumstance findings, the judgment must be affirmed in its entirety.

I. THE FACTS

As a result of his activities in Southern California in the years 1979 and 1980, defendant—who was then in his early 30's—was dubbed the "Freeway Killer" and his murders the "freeway killings." After he was tried in this Los Angeles County proceeding, he was tried in Orange County action No. C-47500. There he was convicted of the first degree murder and robbery of Dennis Frank Fox, Glenn Barker, Russell Rugh, and Lawrence Sharp; as to each murder count a multiple-murder special-circumstance allegation was found true; and for each murder he received the penalty of death.

The evidence introduced at the guilt phase of this action—insofar as it concerns the crimes of which defendant was convicted—tells the following story.

On August 6, 1979, the nude body of 17-year-old Marcus Grabs was found in Malibu Canyon near Las Virgenes Canyon Road; except for the victim's backpack, no clothing or other identifying evidence was discovered at the scene. Grabs had been killed by multiple stab wounds on August 5. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on one ankle as well as on the neck.

On August 27, 1979, the nude body of 15-year-old Donald Hyden was found in the area of Liberty Canyon near the Ventura Freeway; no clothing or other identifying evidence was discovered at the scene. Hyden had been killed by ligature strangulation about August 25 or 26. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

On September 12, 1979, the nude body of David Murillo was found alongside the Ventura Freeway near the Lemon Grove overpass; no clothing or other identifying evidence was discovered at the scene. Murillo had been killed by ligature strangulation about September 9 or 10. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on the wrists as well as on the neck, and revealed indications of sexual activity before death.

On February 3, 1980, the nude body of 15-year-old Charles Miranda was found in an alley in downtown Los Angeles; no clothing or other identifying evidence was discovered at the scene. Miranda had been killed by ligature strangulation the same day. The body showed signs of beating about the [illegible] and elsewhere, exhibited ligature marks on at least one ankle and wrist

as well as on the neck, and revealed indications of sexual activity before death.

On February 6, 1980, the fully clothed body of 12-year-old James Macabe was found near Walnut Drive in Walnut in front of the Pomona Freeway; no identifying evidence other than the clothing was discovered at the scene. Macabe had been killed by ligature strangulation on February 3. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

On March 15, 1980, the nude body of 19-year-old Ronald Gatlin was found near Central Avenue in Duarte; no clothing or other identifying evidence was discovered at the scene. Gatlin had been killed by ligature strangulation on March 14 or 15. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

On March 25, 1980, the nude body of 14-year-old Harry Todd Turner was found in an alley in Los Angeles; no clothing or other identifying evidence was discovered at the scene. Turner had been killed by ligature strangulation sometime on or after March 20. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on the neck, and revealed indications of sexual activity before death.

On April 11, 1980, the nude body of 16-year-old Steven Wood was found in an alley in Long Beach near the Pacific Coast Highway; no clothing or other identifying evidence was discovered at the scene. Wood had been killed by ligature strangulation on April 10 or 11. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on at least one ankle and wrist as well as on the neck.

On April 30, 1980, the nude body of 19-year-old Darin Lee Kendrick was found on Avalon Street in Carson near the Artesia Freeway; no clothing or other identifying evidence was discovered at the scene. Kendrick had been killed by ligature strangulation and a stab wound to the upper cervical spinal cord on April 29 or 30. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on at least one ankle and wrist as well as on the neck.

On June 3, 1980, the nude body of 18-year-old Steven Wells was found behind a gasoline station in Huntington Beach; no clothing or other identifying evidence was discovered at the scene. Wells had been killed by ligature

strangulation on June 2. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

In order to establish that it was defendant who had perpetrated the killings, the prosecution called to the stand Gregory Miley and James Munro.

Miley, a sexual partner of defendant and about 19 years old at the time relevant here, testified that it was defendant who was responsible for the death of Miranda and Macabe. Specifically, he said that he was with defendant as defendant was driving a van he owned on the night of February 2, 1980; defendant picked up Miranda in Hollywood in the early morning hours of February 3, and consensually sodomized him in the back of the van; defendant whispered to Miley, "The kid's going to die," and then started to tie up the youth; defendant asked, "What does your dad want for you? How much do you think we can get for ransom? Maybe a couple thousand?" and Miranda responded, "I don't think that I can get that much"; defendant asked, "How much money do you have?" and Miranda replied, "About $6"; defendant told Miley to take the money, and he complied; Miley said, "Well, why don't you let the kid go?" and defendant answered, "No, man, he'll know the van and he'll know us"; with Miley's help defendant proceeded to beat Miranda and to strangle him with a shirt and to crush his neck with a jack handle; defendant and Miley dumped Miranda's nude body in an alley and disposed of his clothing in various locations.

After doing the deed, Miley continued, defendant said, "Well, I'm horny again. I need another one," Miley responded, "Oh, man, no way. I don't want to do it no more. I just want to go home," but defendant went ahead and eventually picked up Macabe in Huntington Beach in the early afternoon of the same day, February 3, 1980; not long afterwards, defendant and the boy engaged in consensual sexual activity in the van; the trio then drove on; again defendant and the boy engaged in consensual sexual activity; soon, however, defendant started to tie up Macabe; he asked, "What could you get for ransom?" and stated, "This is a kidnap"; the boy tried to fight back; with Miley's help defendant proceeded to beat Macabe and to strangle him with a shirt and to crush his neck with a jack handle; defendant and Miley dumped Macabe's fully clothed body onto the side of a road and took money from his wallet; defendant then threw the wallet out of the van's window.

Miley admitted that he had been arrested and charged with the first-degree murder of Miranda and Macabe. He also admitted that he had been

allowed to enter a plea of guilty to those charges with concurrent sentences of imprisonment for 25 years to life on the condition that he would testify truthfully against defendant.

Munro, who—like Miley—was a sexual partner of defendant and about 19 years old at the time relevant here, testified that it was defendant who was responsible for the death of Wells. Specifically, he said that he was with defendant as defendant was driving his van on June 2, 1980; defendant picked up Wells as he was hitchhiking and participated in mutual consensual oral copulation with him in the back of the van; the trio eventually arrived at defendant's home in Downey; there, defendant and Wells continued their sexual activity, and Munro joined in; soon defendant persuaded Wells to allow himself to be tied up; defendant took from Wells's wallet $10, which was all the money it contained, and also various items of identification; with Munro's help he then beat Wells and strangled him with a T-shirt, disposed of his clothing and other property, and eventually dumped his body behind a gasoline station; defendant told Munro that he was the "Freeway Killer," that Miley was one of his partners in crime, and that he had committed about 14 murders in the course of his activities.

Munro admitted that he had been arrested and charged with the first-degree murder of Wells. He also admitted that he had been allowed to enter a plea of guilty to second-degree murder with a sentence of 15 years to life imprisonment on the condition that he would testify truthfully against defendant.

The prosecution also introduced evidence of extrajudicial admissions by defendant linking him to the crimes charged. Among other witnesses it called David Lopez, a reporter for Los Angeles television station KNXT. Lopez testified that defendant admitted that it was he who had killed the 10 young men and boys named above as well as others. Scott Fraser and Ray Pendleton, acquaintances of defendant, each stated that defendant said that while driving his van he picked up Grabs and in the course of a sexual encounter killed the youth. Jailhouse informers testified to various admissions on the part of defendant. Other witnesses gave testimony to the effect that defendant said he would not leave witnesses to his criminal activity alive.

The prosecution presented expert testimony to the following effect: the bodies of Miranda, Wells, and Wood each bore a kind of triskelion-shaped fiber that was not common but was consistent with carpeting in defendant's van; the bodies of Gatlin, Grabs, and Macabe each revealed the presence of foreign hair that matched defendant's; the body of Gatlin bore a seminal

fluid stain that could have been made by defendant; and the van and defendant's home were stained in several places with human blood.

The defense generally tried to show that the prosecution had not carried its burden of proof beyond a reasonable doubt. Particularly, it attempted to discredit the witnesses who testified against defendant.

At the penalty phase the prosecution presented evidence in aggravation. Some of that evidence related to prior adjudicated felonies. Defendant committed sexual attacks in late 1968 and early 1969 against 12-year-old Lawrence B., 14-year-old William J., 17-year-old John T., and 18-year-old Jesus M. As a result of his activities, he was convicted of molesting and forcibly orally copulating Lawrence B., kidnapping and sodomizing William J., sodomizing John T., and forcibly orally copulating Jesus M., and was committed to Atascadero State Hospital as a mentally disordered sex offender amenable to treatment. In 1971 he was returned to court, declared unamenable to further treatment, and committed to prison. In 1974 he was released. In 1975 he committed a sexual attack on 14-year-old David M. Later that year he was convicted of forcibly orally copulating the boy and was sentenced to prison. In 1978 he was paroled. The prosecution also introduced evidence relating to the Orange County killings, attempting to prove that in late 1979 and early 1980 defendant killed, and committed other offenses against, Dennis Frank Fox, Glenn Barker, Russell Rugh, and Lawrence Sharp.

In mitigation the defense presented evidence to the following effect. Defendant's father caused the family serious problems as a result of drinking and gambling. At age 10 defendant was in trouble and was sent to a detention home; while there he was sexually molested. At age 12 he stole a truck and was put into custody. Later, he joined the armed forces, served in Vietnam, and was decorated. A psychologist opined that defendant could function in the structured setting of a prison—and only in such a setting—and that there he could be productive.

II. GUILT ISSUES

Defendant raises a number of claims going to the question of guilt. None, as we shall explain, establishes reversible error.

A. *Conflict of Interest on the Part of Defense Counsel*

Defendant contends that in violation of the rule established by the United States Supreme Court in *Wood* v. *Georgia* (1981) 450 U.S. 261 [67 L.Ed.2d 220, 101 S.Ct. 1097], the trial court failed to inquire into the possibility of a

conflict of interest burdening his counsel at trial or failed to adequately act in response to what its inquiry discovered.

1. *The Facts*

On August 8, 1980, charges in what was to become this action were filed against defendant. On August 11, Earl L. Hanson was appointed to represent him as an indigent pursuant to Penal Code section 987.

Trial was set for May 4, 1981. Over the prosecution's objection, the court vacated the date and ordered a continuance, in part to allow defense counsel Hanson further time for preparation.

Trial was rescheduled for August 3, 1981. Again over the prosecution's objection, the court vacated the date and ordered a continuance, in part to allow Hanson further time for preparation. Trial was set for September 14, 1981.

At a hearing held on September 3, 1981, defendant expressed his intention to move to substitute the law firm of Charvet & Stewart and its partners William T. Charvet and Tracy L. Stewart as retained counsel in the place of Hanson, and to request a continuance to allow new counsel time to prepare for trial. The prosecution, through Deputy District Attorney Sterling E. Norris, stated that it would oppose such a motion, claiming that substitution would delay the commencement of trial and thereby seriously prejudice the People's case, and that certain previous dealings between Charvet & Stewart and key prosecution witness James Munro threatened to burden the firm with a conflict of interest if it undertook to represent defendant. Prior to this hearing, defendant had never indicated on the record any dissatisfaction with Hanson or any ability or desire to retain other counsel.

On September 14, 1981, the date on which trial was scheduled to commence, defendant made a motion to substitute Charvet & Stewart in the place of Hanson. The prosecution opposed the request on the following grounds: "1) That said motion is not timely made. [¶] 2) That any such continuance would substantially prejudice the People's case. [¶] 3) That there is a conflict of interest with Mr. Charvet in that he has talked to Mr. Munro and has attempted to represent him in the past. Mr. Munro will be one of the key witnesses presented by the prosecution. [¶] 4) That any retainer agreement by Mr. Charvet may involve book rights, creating an additional conflict."

As to the timeliness of the motion and defendant's reasons for requesting substitution, the record of the hearing reveals the following. Hanson

assured the court, "of my own opinion Mr. Bonin has never tried to be dilatory." Charvet can be understood to have stated that defendant had begun substantive discussions with him concerning representation "about four or five months ago." Hanson admitted he "was never the attorney of choice of Mr. Bonin." The court then asked the following questions and defendant gave the following answers.

"THE COURT: Mr. Bonin, you have had no difficulty with Mr. Hanson insofar as his representation of you is concerned, it's just a matter of personal choice that you want Mr. Charvet as your attorney; is that correct?

"THE DEFENDANT: I'm sorry, could you repeat that, Your Honor?

"THE COURT: You just personally want Mr. Charvet as your attorney of record; is that right?

"THE DEFENDANT: Yes, I feel like I have a much better rapport with Mr. Charvet than I do with any other attorney, at this point.

"THE COURT: Insofar as your relationship with Mr. Hanson is concerned, that has been a good one during the time he has represented you; is that right?

"THE DEFENDANT: It has but I don't feel that it has been to the point where it should be. . . .

"THE COURT: In what regard?

"THE DEFENDANT: Well, there is certain things that we cannot—that I don't feel I can discuss about the case.

"THE COURT: With Mr. Hanson?

"THE DEFENDANT: That's correct.

"THE COURT: Why?

"THE DEFENDANT: Personal vibes.

"THE COURT: Any other difficulty you have with Mr. Hanson other than these personal vibes?

"THE DEFENDANT: No legal problems, no."

For his part, prosecutor Norris told the court that further delay—Charvet said he would need "at least a 120 day continuance"—would result in the erosion of the testimony of his witnesses and thereby seriously prejudice the People's case. Norris also asserted that defendant made the substitution motion for purpose of delay. Specifically, he stated that it was defendant's intent—expressed, he said, in a surreptitiously recorded telephone conversation that was played for the court but not transcribed—that "if the Court does not grant the continuance for Mr. Charvet he is going to go pro. per. and get a six months continuance and then get another lawyer during that period of time."

Concerning Munro and the conflict of interest that would allegedly arise if Charvet & Stewart undertook to represent defendant, the record shows that many factual issues were hotly disputed.

Charvet denied the existence of an attorney-client relationship or the communication of significant information. For example, he said: "But as far as conflict of interest, I have nothing that I can cross-examine Mr. Munro on, any facts contrary that is not in the public record, that he has ever given me as a private attorney." Further, in a declaration submitted in support of the substitution motion, he stated: "[I]t is my belief that at no time was there an attorney-client relationship between Charvet & Stewart and Mr. Monroe [*sic*] as we were never retained by Mr. Monroe [*sic*], were never court appointed on his behalf, nor, employed in any way to represent Mr. Monroe [*sic*]." He also declared: "[I]t is my belief that at no time has there been a conflict of interest which would prevent the requested substitution." In another declaration, Charvet's partner Stewart stated: "I do not recall [Munro] making any admissions, nor imparting any confidential information to either of us." Finally, at the September 3 hearing, Charvet asserted: "We did not discuss anything regarding the case."

By contrast, prosecutor Norris claimed that an attorney-client relationship did in fact exist between Charvet & Stewart and Munro and that significant information passed from Munro to the firm. Moreover, he offered to call, among others, Munro himself "[i]f there's any question that [Charvet]'s talked in detail with Mr. Munro about the case . . . ."

It was, however, plain that Munro had sought the assistance of Charvet and Stewart with a view to obtaining their professional services, and that he had spoken with them about the matter of representation and—at least to some extent—about the facts of the case. For example, in his declaration in support of the substitution motion, Charvet stated: "During one or two of our visits to other inmates/clients, our office conversed with Mr. Monroe [*sic*] for a short period regarding our possible substitution in as the

attorneys." In her declaration, Stewart stated: "[S]ometime in the latter part of 1980, our office was contacted by James Monroe [*sic*], requesting a meeting with WILLIAM T. CHARVET. Subsequently, William T. Charvet and I met with Monroe [*sic*] at the Los Angeles County Jail. He expressed a desire to have us substitute in as his counsel. We discussed this with him . . . ." At the hearing Charvet impliedly admitted that he and Stewart discussed the facts of the case with Munro—"He stated . . . that he was innocent" —but claimed the discussion was minimal.

Prosecutor Norris emphasized the practical danger posed by the issue of the possibility of a conflict of interest. At one point he stated: "This does now present another problem, a problem on appeal for the People if a conviction results in this case. [¶] I cannot believe that an appeal counsel would not immediately seize upon that in some fashion in that kind of conflict." At another point he said: "What is the first thing appellate counsel is going to seize on in this case if [Charvet & Stewart] is allowed to substitute in as counsel? And that is the conflict of interest. . . . [¶] I think there is that possibility. That would be the first point seized on in any type of appeal."

Finally, as to the alleged literary-rights fee agreement between defendant and Charvet & Stewart and the conflict inherent in such an arrangement, the record contains the following colloquy.

"THE COURT: [Mr. Charvet,] It's suggested that you might address the subject of what your arrangements are with the defendant insofar as any book rights are concerned.

"MR. CHARVET: I told Mr. Norris the first time talked to him and I'll tell him now again, that absolutely, he can research all he wants to, he has absolutely no right to go into my fee arrangement with this client or any client I have ever had, or anything else and that is—in fact, the case that he cited [*People* v. *Corona* (1978) 80 Cal.App.3d 684 [145 Cal.Rptr. 894]] is on appeal and that's even a questionable case.

"I'm not making a statement one way or the other, but I would feel very confident from the U.S. Supreme Court stating the following: That if a person's only asset that he had in the whole world was a book right to get an attorney of his choice—let's use this hypothesis—as long as the defendant himself did not benefit in any other way and saved the state and the county, and everyone else the money and he had the attorney of his choice then I think that they would even allow that, and I think that's what's going to end up with in the *Corona* case he's talking about and I think that's what's going to come out of the appeal.

"Other than that, is there anything else the Court —

"THE COURT: Not at this point."

Prosecutor Norris attempted to raise the issue again. He stated: "I think the Court is at least entitled to ask defense counsel the very limited question, 'Are those book rights a part of your retainer?' And if the answer is in the affirmative then I think the *Corona* case is substantial authority, in conjunction with the other conflict of interest that we have with Mr. Charvet representing Mr. Bonin, and I think Your Honor is entitled to ask that question and demand an answer from Mr. Charvet in regard to that." The court, however, made no inquiry into the matter.

Thereupon, the court denied the motion for substitution. Because of scheduling problems and in recognition of defendant's expressed desire to seek review by petition for writ of mandate to the Court of Appeal, it continued commencement of trial to the following Monday, September 21, 1981. To support its ruling it gave the following reasons.

"I'm satisfied based upon what I have heard that to walk into court on the day of trial after fourteen months of preparation and then ask this Court for a further continuance, ninety or 120 days or beyond that is an unreasonable disruption of the judicial process.

". . . I think not only does the defendant have a right to a speedy trial, the People have a right to a speedy trial, and by granting a further delay in this matter of any substantial nature is going to substantially hurt the People's case, and I make that finding.

"Secondly, Mr. Charvet, I'm deeply concerned with whatever contact you did have with the witness Munro who is going to be a witness in this case, and I think a conflict situation has, in fact, developed to the point that I don't see how the People can fairly call that witness to the witness stand and anticipate your cross-examination of a witness that you have talked to in the vein of possibly representing him, and there is that conflict.

". . . . . .

"I want the record, also, if there's a possible writ on this matter, to be also clear I am deeply concerned with the fact that I think that this is a ploy by this defendant based upon what I've heard at this hearing, to delay this matter going to trial and I'm satisfied that if a continuance was granted through further efforts by this defendant that further delays would be sought and that the ends of justice would further be thwarted by his effort of

substituting an attorney or attempting to substitute an attorney fourteen months later on the date of trial."

After the court ruled on the matter of substitution, defendant made a motion to represent himself if Charvet & Stewart was not allowed to substitute into the case in the place of Hanson. The court asked, "Are you prepared to go to trial next Monday acting as your own lawyer?" and defendant answered, "I don't know. . . . I'd want to look over [the case] again and be able to answer that next Monday." Thereupon, the court stated as follows. "Well, we will withhold any ruling on your motion to act as your own attorney in this matter. [¶] Mr. Hanson will be your attorney of record. [¶] You confer with Mr. Charvet and Mr. Hanson and decide what appellate processes are going to be sought between now and next Monday. [¶] But if you decide not to seek any appellate review of this Court's ruling and that be your desire to act as your own attorney, we will take that up next Monday, but it will be with no further continuance if you want to come into this case and act as your own lawyer. We're going to go to trial on the date set. And it will not be a grant of pro. per. status to you predicated or based upon any lengthy continuance for trial preparation."

On September 18, 1981—as we may judicially notice (Evid. Code, §§ 452, subd. (d), 459, subds. (a), (c)) —Charvet & Stewart submitted to the Court of Appeal a petition for writ of mandate on defendant's behalf seeking review of the court's ruling. In the accompanying memorandum of points and authorities it was stated that "There is no conflict of interest" involving Munro and that "a full disclosure and waiver were obtained by counsel from Bonin." In a form verification to the petition, defendant declared in relevant part: "I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true." On that same day, the Court of Appeal summarily denied the petition.

On September 21, 1981, the date to which the commencement of trial had been continued, Charvet informed the court of the Court of Appeal's decision and stated that he intended to seek a hearing on the matter in this court. Defendant told the court that it was still his desire to proceed pro se if Charvet & Stewart was not allowed to substitute into the case in the place of Hanson.

In order to give Charvet an opportunity to file a petition for a hearing and to provide defendant with time to prepare to represent himself in the event substitution was not allowed, the court made the following order.

"All right. Here's what I'm going to do in this matter at this time: [¶] I'm going to order a continuance in this matter for approximately 30 days. [¶] Today is the 21st. I'm going to set the matter for Monday, the 19th of October, and on the 19th of October we're going to start the trial in this matter.

". . . . . .

"We're going to start the trial in one of three possible ways.

". . . . . .

"Mr. Charvet, if you desire to come into this matter and commence trial on the 19th of October, start jury selection, if that be Mr. Bonin's request and you are prepared to proceed to trial at that date, you will become the attorney of record. We will start the trial.

"If you indicate that you are not prepared to go to trial on that date and cannot be prepared to go to trial on that date, then we're going to go into plan B.

"Plan B is, Mr. Hanson, you will start the trial at that time in the event that Mr. Bonin wants you as the attorney of record.

"If he does not want you as the attorney of record, we're then going to plan C and we will go to trial on plan C, and that is, Mr. Bonin, you be prepared to act as your own lawyer. You will proceed to trial as your own attorney and, Mr. Hanson, you will be appointed as advisory counsel in the event that that does occur, and you will assist Mr. Bonin in taking this matter to trial on that date.

". . . . . .

"But whether we go plan A, plan B, plan C, be here on that date, the 19th, prepared to proceed to trial."

After the court made its order, Charvet sought a clarification as to the issue of conflict of interest. "Your Honor, I now have a problem with plan A. [¶] There has been a ruling against me by Your Honor on three issues. Conflict of interest, delay tactics of the defendant. [¶] If, in fact, the conflict of interest is valid, if given the 30 days, let's assume hypothetically I am prepared to go to trial on October 19th, I still have the issue of conflict of interest if the Supreme Court has not ruled one way or the other. I have a problem."

The court failed to address the conflict issue at all, stating only: "Of course, plan A, B and C will all be nullified in the event the Supreme Court decides to stop it. [¶] All right. So we don't complicate this matter any further, . . . let's end the hearing at this time. [¶] October 19th is the date now set for trial."

As it turned out, Charvet & Stewart did not make an application in this court for a hearing on the Court of Appeal's denial of its petition for a writ of mandate.

On October 19, 1981, the date to which the commencement of trial had been continued, the court ordered the substitution of Charvet & Stewart as counsel for defendant in the place of Hanson. The relevant colloquy is as follows.

"THE COURT: All right. This case of People vs. William George Bonin, let's have the record reflect the appearance of the defendant in court, at this time represented by his attorney Mr. Earl Hanson, Mr. Norris representing the interest of the People. [¶] This matter is here, now, for trial. [¶] However, there is pending at this time a motion for substitution of attorneys. [¶] Mr. Hanson, do you want to be heard on the matter?

"MR. HANSON: Yes, if the Court please, Your Honor. [¶] Mr. Bill Charvet is present in court. At the request of Mr. Bonin, Mr. Charvet is here. [¶] It is Mr. Bonin's request that Mr. Charvet represent Mr. Bonin in his upcoming trial. [¶] It is, of course, with my consent, Your Honor, and my best wishes. [¶] I understand that Mr. Charvet agrees to accept the substitution and is prepared to commence the trial.

"THE COURT: Mr. Charvet; do you want to be heard?

"MR. CHARVET: Yes, Your Honor, that's correct.

"THE COURT: You are desirous at this time of becoming the attorney of record in this matter?

"MR. CHARVET: That's correct.

"THE COURT: And that's with the understanding that if I permit you to become the attorney of record in the matter we'll start the jury selection today; is that correct?

"MR. CHARVET: That's affirmative.

"THE COURT: And you are prepared to proceed?

"MR. CHARVET: I am.

"THE COURT: Are the People ready?

"MR. NORRIS: People are ready, Your Honor.

"THE COURT: All right. [¶] Mr. Bonin, is that what you want at this time? You want me to substitute Earl Hanson out as your attorney of record and Mr. Charvet to become your attorney of record for all purposes in this trial; is that correct?

"THE DEFENDANT: Yes, it is.

"THE COURT: All right. I'll order the substitution. Mr. Charvet, you are now the attorney of record for Mr. Bonin. [¶] Mr. Hanson, you are excused from further services in this matter."

Called by the prosecution at trial, Munro testified that he and defendant killed Wells. In cross-examination that spanned several days, Charvet attempted to destroy Munro's credibility, suggesting that Munro killed Wells without defendant's help or support. He exposed myriad inconsistencies in Munro's testimony at and before trial and in various statements he had made; compelled him to admit that he lied on numerous occasions; and forced him to concede that he testified against defendant solely to avoid the death penalty. In closing argument, Charvet exploited the record of the cross-examination to urge the jury to reject Munro's testimony out of hand as unworthy of belief.

2. *The Law*

(1) Under both the Sixth Amendment to the United States Constitution as applied to the states through the due process clause of the Fourteenth Amendment (e.g., Powell v. *Alabama* (1932) 287 U.S. 45, 68-71 [77 L.Ed. 158, 170-172, 53 S.Ct. 55, 84 A.L.R. 527]; see, e.g., *Holloway* v. *Arkansas* (1978) 435 U.S. 475, 481-487 [55 L.Ed.2d 426, 432-436, 8 S.Ct. 1173]) and article I, section 15 of the California Constitution (e.g., *People* v. *Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839]; see, e.g., *People* v. *Chacon* (1968) 69 Cal.2d 765, 773-774 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454]), a defendant in a criminal case has a right to the assistance of counsel.

(2) The constitutional guaranty "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People* v. *Ledesma*, *supra*, 43 Cal.3d at p. 215, italics in original [discussing both federal and state constitutional rights]; accord, *Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333] [discussing state constitutional right]; see, e.g., *Holloway* v. *Arkansas*, *supra*, 435 U.S. at p. 481 [55 L.Ed.2d at pp. 432-433]; *People* v. *Chacon*, *supra*, 69 Cal.2d at pp. 773-774 [discussing both federal and state constitutional rights].)

Included in the right to the effective assistance of counsel is "a correlative right to representation that is free from conflicts of interest." (*Wood* v. *Georgia*, *supra*, 450 U.S. at p. 271 [67 L.Ed.2d at p. 230]; accord, *Lewersen* v. *Superior Court* (1983) 34 Cal.3d 530, 536-537 [194 Cal.Rptr. 448, 668 P.2d 755] [discussing federal constitutional right]; *People* v. *Chacon*, *supra*, 69 Cal.2d at p. 774 [discussing both federal and state constitutional rights]; see *Cuyler* v. *Sullivan* (1980) 446 U.S. 335, 345-350 [64 L.Ed.2d 333, 344-348, 100 S.Ct. 1708]; *Holloway* v. *Arkansas*, *supra*, 435 U.S. at p. 481 [55 L.Ed.2d at pp. 432-433]; *Glasser* v. *United States* (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457].)

(3) The right to the assistance of counsel "was designed to assure fairness in the adversary criminal process. . . . [In other words,] the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial,' [citation] . . . . [I]n evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.' [Citation.] Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (*Wheat* v. *United States* (1988) __U.S. __, __-__ [100 L.Ed.2d 140, __, 108 S.Ct. 1692, 1696-1697].)

(4) Further, the constitutional guaranty protects the defendant who retains his own counsel to the same degree and in the same manner as it protects the defendant for whom counsel is appointed, and recognizes no distinction between the two. (*Cuyler* v. *Sullivan*, *supra*, 446 U.S. at pp. 344-345 [64 L.Ed.2d at p. 344].)

(5) Finally, this right is "fundamental" (*Cuyler* v. *Sullivan*, *supra*, 446 U.S. at p. 343 [64 L.Ed.2d at p. 343]) and "is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" (*Holloway* v. *Arkansas*, *supra*, 435 U.S. at p. 489 [55 L.Ed.2d at p. 437], quoting *Chapman* v. *California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 710, 87 S.Ct. 824, 24 A.L.R.3d 1065]; accord, *Cuyler* v.

Sullivan, supra, at p. 349 [64 L.Ed.2d at p. 347]; *Rose* v. *Clark* (1986) 478 U.S. 570, 577-578 [92 L.Ed.2d 460, 470, 106 S.Ct. 3101].)

(6) Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. (See generally ABA, Model Rules Prof. Conduct (1983) rule 1.7 and com. thereto [hereinafter ABA, Model Rules].)

Conflicts spring into existence in various factual settings. For example, conflicts may arise in circumstances in which one attorney represents more than one defendant in the same proceeding. (See, e.g., *Holloway* v. *Arkansas, supra,* 435 U.S. at pp. 481-491 [55 L.Ed.2d at pp. 432-438]; *People* v. *Mroczko* (1983) 35 Cal.3d 86, 103-109 [197 Cal.Rptr. 52, 672 P.2d 835].) In such cases there is at least the possibility that "the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties" (*Cuyler* v. *Sullivan, supra,* 446 U.S. at p. 356, fn. 3 [64 L.Ed.2d at pp. 351-352] (conc. & dis. opn. of Marshall, J.)) and thereby undermine his loyalty to, or efforts on behalf of, one or all. Such a conflict, it is plain, can result in the infringement, or even the denial, of the defendant's constitutional right to the effective assistance of counsel.

Conflicts may also arise in situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter. (See, e.g., *Leversen* v. *Superior Court, supra,* 34 Cal.3d at pp. 536-540; *United States* v. *Armedo-Sarmiento* (2d Cir. 1975) 524 F.2d 591, 592 (per curiam).)

Such a conflict springs from the attorney's duty to provide effective assistance to the defendant facing trial and his fiduciary obligations to the witness with whom he has or had a professional relationship. (*Leversen* v. *Superior Court, supra,* 34 Cal.3d at p. 538.) "An attorney is forbidden to use against a [present or] former client any confidential information . . . acquired during that client relationship. [Citations.] Moreover, the attorney has a duty to withdraw, or apply to a court for permission to withdraw, from representation that violates those obligations. [Citation.] So important is that duty that it has been enforced against a defendant's attorney at the instance of his former client (who was also a codefendant) even at the expense of depriving the defendant of his choice of counsel. [Citation.]" (*Ibid.*) In a word, a conflict based on the attorney's obligations to a criminal defendant and to a present or former client, "as well as conflicts arising out of simultaneous representation of codefendants, may impair a defendant's constitutional right to assistance of counsel." (*Ibid.*)

Conflicts may also arise in situations in which an attorney undertakes representation of a defendant in exchange for the literary rights to a portrayal or account based on information relating to the representation. (See, e.g., *Maxwell* v. *Superior Court, supra,* 30 Cal.3d at pp. 616-617; *Ray* v. *Rose* (6th Cir. 1976) 535 F.2d 966, 974; *United States* v. *Hearst* (N.D.Cal. 1978) 466 F.Supp. 1068, 1082-1083 [53 A.L.R.Fed. 110], affd. in part and vacated and remanded in part on other grounds (9th Cir. 1980) 638 F.2d 1190; *People* v. *Corona, supra,* 80 Cal.App.3d at p. 720; ABA, Model Rules, *supra,* rule 1.8(f) and com. thereto; ABA, Model Code Prof. Responsibility (1982) DR 5-104(B), EC 5-4; ABA, Standards for Criminal Justice, Stds. Relating to the Prosecution Function and the Defense Function (1971) The Defense Function, std. 3.4 and com. thereto [hereinafter ABA, Standards, The Defense Function].)

As the American Bar Association has stated: "A grave conflict of interest can arise out of an arrangement between a lawyer and an accused to give to the lawyer the right to publish books, plays, articles, interviews or pictures, or related literary rights concerning the case. . . . [I]t may place the lawyer under temptation to conduct the defense with an eye on the literary aspects and its dramatic potential. If such an arrangement or contract is part of the fee, in lieu of the fee, or a condition of accepting the employment, it is especially reprehensible." (ABA, Standards, The Defense Function, *supra,* com. to std. 3.4; see *Maxwell* v. *Superior Court, supra,* 30 Cal.3d at p. 616 [to similar effect].)

(7) In order to safeguard a criminal defendant's constitutional right to the assistance of conflict-free counsel and thereby keep criminal proceedings untainted by conflicted representation, the United States Supreme Court has laid down certain essentially prophylactic rules in this area.

When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. (*Wood* v. *Georgia, supra,* 450 U.S. at p. 272 [67 L.Ed.2d at p. 230]; see *Holloway* v. *Arkansas, supra,* 435 U.S. at p. 484 [55 L.Ed.2d at p. 434].) It is immaterial how the court learns, or is put on notice, of the possible conflict, or whether the issue is raised by the prosecution (see *Wood* v. *Georgia, supra,* at pp. 272-273 [67 L.Ed.2d at pp. 230-231]) or by the defense (see *Holloway* v. *Arkansas, supra,* at p. 484 [55 L.Ed.2d at p. 434]).

The trial court is obligated not merely to inquire but also to act in response to what its inquiry discovers. (See *Holloway* v. *Arkansas, supra,* 435 U.S. at p. 484 [55 L.Ed.2d at pp. 434-435].) In fulfilling its obligation, it may, of course, make arrangements for representation by conflict-free

counsel. (*Ibid.*) Conversely, it may decline to take any action at all if it determines that the risk of a conflict is too remote. (*Ibid.*) In discharging its duty, it must act "'. . . with a caution increasing in degree as the offenses dealt with increase in gravity.'" (*Glasser* v. *United States*, *supra*, 315 U.S. at p. 71 [86 L.Ed.2d at p. 699].)

(8) After the trial court has fulfilled its obligation to inquire into the possibility of a conflict of interest and to act in response to what its inquiry discovers, the defendant may choose the course he wishes to take. If the court has found that a conflict of interest is at least possible, the defendant may, of course, decline or discharge conflicted counsel. But he may also choose not to do so: "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." (*Holloway* v. *Arkansas*, *supra*, 435 U.S. at p. 483, fn. 5 [55 L.Ed.2d at p. 433]; accord, *Glasser* v. *United States*, *supra*, 315 U.S. at p. 70 [86 L.Ed.2d at p. 700].)

(9) To be valid, however, "waivers of constitutional rights must, of course, be 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences[,]' . . . [and] must be unambiguous and 'without strings.'" (*People* v. *Mroczko*, *supra*, 35 Cal.3d at p. 110, quoting *Brady* v. *United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747, 756, 90 S.Ct. 1463], and *United States* v. *Dolan* (3d Cir. 1978) 570 F.2d 1177, 1181, fn. 7.)

(10) Before it accepts a waiver offered by a defendant, the trial court need not undertake any "particular form of inquiry . . ., but, at a minimum, . . . must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People* v. *Mroczko*, *supra*, 35 Cal.3d at p. 110; see *Glasser* v. *United States*, *supra*, 315 U.S. at p. 71 [86 L.Ed.2d at pp. 699-700] [to similar effect].)

(11a) When in violation of its duty the trial court fails to inquire into the possibility of a conflict of interest or fails to adequately act in response to what its inquiry discovers, it commits error under *Wood* v. *Georgia*, *supra*, 450 U.S. 261. (*Id.* at p. 272 [67 L.Ed.2d at pp. 230-231].)

To obtain reversal for *Wood* error, the defendant need not demonstrate specific, outcome-determinative prejudice. (See *Brien* v. *United States* (1st Cir. 1982) 695 F.2d 10, 14-15.) But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance. (See *Wood* v. *Georgia*, *supra*, 450 U.S. at pp. 272-274 [67 L.Ed.2d at pp. 230-232]; *Brien* v. *United States*, *supra*, at p. 15, fn. 10; cf. *Strickland* v. *Washington* (1984) 466 U.S. 668, 692 [80 L.Ed.2d 674, 696, 104 S.Ct. 2052] [holding that violation of a defendant's right to conflict-free counsel requires reversal only if the defendant shows actual conflict and adverse effect].)

3. *Discussion*

(12) We turn now to the case at bar. We believe that the trial court did not fail to satisfy the requirements of *Wood* with regard to the alleged literary-rights fee agreement between defendant and Charvet & Stewart. The court cannot be deemed to have known, or to have had reason to know, of the possibility of a conflict in this regard. In our view, a court can be held to have knowledge or notice of the possibility of a conflict only when, as in *Wood* itself (450 U.S. at p. 266 [67 L.Ed.2d at p. 227]), it is provided with *evidence* of the existence of a conflict situation—a circumstance not present here. Otherwise, it would effectively be burdened with undertaking an inquiry in virtually all cases since it can almost always conclude that a conflict is "possible" as a matter of speculation. Such a burden, however, would be intolerable.

We recognize that in this case it seems easy to conjecture the existence of a literary-rights fee agreement. Defendant was indigent at the time defense counsel Hanson was appointed and apparently remained so; the case had an extremely high profile; and when the court raised the issue of the existence of a literary-rights fee agreement, Charvet replied nonresponsively with an opinion that the United States Supreme Court would not declare such an arrangement unlawful per se. But although these matters might perhaps lay a basis for speculation, they simply do not amount to evidence sufficient to trigger the duty of inquiry.

(13a) We believe, however, that the trial court did fail to discharge its duties under *Wood* with regard to the possibility of a conflict of interest burdening Charvet & Stewart arising from the firm's former attorney-client relationship with Munro.

We recognize that initially the court acted as it was required to: it inquired into the possibility of a conflict; it then determined in effect that an attorney-client relationship had existed between Charvet & Stewart and Munro and hence that the firm faced an at least potential conflict if it undertook to represent defendant; and it denied the substitution motion in part because of the threat of that conflict.

But the court then proceeded to nullify the effect of its action when on the first day of trial it ordered the substitution of Charvet & Stewart in the place of Hanson without making any attempt at all to obtain from defendant a waiver of his constitutional right to the assistance of conflict-free counsel.

The court's conduct in this regard is inexplicable. Prosecutor Norris had twice emphasized the practical danger posed by the conflict issue, arguing presciently that "That would be the first point seized upon in any type of appeal." For his part, Charvet had made it plain that the danger did indeed exist: "If, in fact, the conflict of interest is valid, . . . I still have the issue of conflict of interest if the Supreme Court has not ruled one way or the other. I have a problem." He also had made it plain that the danger could readily be avoided by a waiver on the part of defendant: "Now Mr. Bonin has waived all semblance of any type of conflict of interest. [¶] He'd be glad to do that now on the stand. He told me that. He told Mr. Hanson that. He'd be glad, at this point, to put him under oath, have him state it on the record, and that takes care of his problem as far as any type of reversal [on appeal] from Mr. Bonin's standpoint, if there was, in fact."

Accordingly, we are compelled to conclude that in acting as it did the trial court failed to act properly under the *Wood* rule—and plainly failed to act with the caution required in a capital proceeding (see *Glasser* v. *United States*, *supra*, 315 U.S. at p. 71 [86 L.Ed.2d at p. 699]).

(14) Against our conclusion, the Attorney General makes several arguments. To begin with, he may be understood to argue that defendant made no objection to the possibility of conflicted representation at the trial level and accordingly may raise no complaint about the matter on appeal. Under the relevant precedents, however, a defendant who has not made an objection below is not prohibited from raising on review a claim of a *Wood* violation. Indeed, it appears that in *Wood* itself the defendants never objected at any stage of the proceedings. (See 450 U.S. at p. 282, fn. 8 [67 L.Ed.2d at pp. 236-237] (dis. opn. of White, J.).) Moreover, under the reasoning of the case law, a defendant who has failed to make an objection should not be barred from raising the claim. To our mind, so long as the trial court knew, or reasonably should have known, of the possibility of a conflict of interest, it is immaterial whether or not the defendant made any objection. Indeed, unless the court makes an inquiry and discovers an at least potential conflict, the defendant may have no substantial reason to object to the possibly conflicted representation.[1]

[1] In his concurring opinion in *Cuyler* v. *Sullivan*, *supra*, 446 U.S. 335, 351-353 [64 L.Ed.2d 333, 348-349], Justice Brennan presents analysis that seems to imply that a defendant may not raise a claim of a *Wood* violation when the court has (1) inquired into the possibility of a conflict of interest, (2) warned him of the risks of conflicted representation, and (3) ascertained that he voluntarily and intelligently chose such representation. In this case we can find no such "waiver": the trial court plainly failed to satisfy Justice Brennan's second and third requirements.

(15) The Attorney General next argues that the prosecution must be deemed to have withdrawn its "conflict of interest" objection to the substitution of Charvet & Stewart in the place of Hanson. The record is otherwise, supporting at most an inference that the prosecution simply failed to press its objection. But in any event, whether or not the prosecution withdrew its objection is immaterial here: although on these facts the prosecution's objection triggered the court's duty to inquire into the possibility of a conflict, its withdrawal of an objection could not release the court from its obligation to complete the task imposed on it by law.

(13b) The Attorney General then argues that the trial court did not in fact fail to discharge its duties. In support, he maintains the court was not required to do anything more than it did. In light of the discussion presented above, however, the point must be rejected.

(16a) The Attorney General next argues that defendant must be deemed to have waived his constitutional right to the assistance of conflict-free counsel. To make his point he directs our attention to the following: defendant was present at the relevant hearings and heard the colloquy among the court and counsel about the dealings between Charvet & Stewart and Munro, including Charvet's opinion that no attorney-client relationship had existed between his firm and Munro; defendant said that he wanted to be represented by Charvet & Stewart; Charvet made the representation, quoted above, that defendant was willing to waive his constitutional right to the assistance of conflict-free counsel; finally, the memorandum of points and authorities accompanying Charvet & Stewart's petition for writ of mandate stated, "a full disclosure and waiver were obtained by counsel from Bonin," and defendant executed a form verification of the petition.

(17) As a reviewing court, "We indulge every reasonable presumption against the waiver of unimpaired assistance of counsel." (*People* v. *Mroczko*, *supra*, 35 Cal.3d at p. 110; accord, *Glasser* v. *United States*, *supra*, 315 U.S. at p. 70 [86 L.Ed.2d at p. 699].) (16b) In this case, we find nothing that rebuts any such presumption.

First and foremost, defendant did not even purport to make a personal, on-the-record waiver of his constitutional right to the assistance of conflict-free counsel. This fact is established beyond dispute, and the Attorney General does and can make no claim to the contrary.

We recognize that defendant was present at the hearings. But what he may reasonably be held to know about the issue of the conflict of interest is

hard to determine. He heard prosecutor Norris argue that Charvet & Stewart had an attorney-client relationship with Munro and as a result would be burdened with a conflict if it undertook to represent him at trial, and he heard Charvet argue to the contrary; he saw the court determine that there would indeed be a conflict, and he saw the court subsequently ignore that determination.

It is true that defendant stated that he wanted Charvet & Stewart to represent him at trial. His statement, however, is without significance here since it was not made in light of a constitutionally adequate, on-the-record advisement of the possible dangers and consequences of conflicted representation.

It is also true that Charvet declared that defendant would personally waive his constitutional right to the assistance of conflict-free counsel on the record. But the fact is that defendant did not even purport to make such a waiver.

Finally, we recognize that the memorandum of points and authorities accompanying the petition for writ of mandate stated, "a full disclosure and waiver were obtained by counsel from Bonin," and that defendant executed a form verification of the petition. Defendant's verification, however, cannot be deemed a waiver. On its very face, it is altogether too broad and conclusory, providing the court with none of the assurances the Constitution requires it to obtain before accepting a waiver. More important, it is lacking in relevant legal effect: it verifies the *petition* and not the memorandum of points and authorities in which the statement about disclosure and waiver appears.

Thus, even when we read the record as favorably as we can to support the Attorney General's argument, we are compelled to conclude that it shows no more than that defendant might have been willing to waive his constitutional right to the assistance of conflict-free counsel and that such a waiver might have been knowing and intelligent.

A showing of that sort, however, is simply not enough. As we stated above, "at a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People* v. *Mroczko, supra,* 35 Cal.3d at p. 110.) Here, it is plain, the trial court did not even attempt to obtain such an assurance.

(10) The Attorney General next argues in substance that defendant caused whatever error the trial court may have committed and accordingly may not be heard to raise any complaint. His argument is to the following effect: defendant's motions to substitute Charvet & Stewart in the place of Hanson and to proceed pro se if substitution was not allowed constituted attempts to delay trial and thereby prejudice the People's case; confronting such attempts, the court was compelled to act as it did; therefore, if any of its acts or omissions was improper, defendant was responsible for the error and hence should not be allowed to derive any benefit therefrom.

Why defendant made his motions is hard to determine to any degree of certainty. The record does indeed support an inference that defendant acted for the sole purpose of delaying trial and prejudicing the People's case. But the record also supports another inference—viz., that as he faced a trial at which his life would be at stake, defendant wanted to be represented by counsel in whom he had full confidence or by no counsel at all.

Whatever defendant's motives may have been, we simply cannot conclude that defendant can be held responsible for the error of which he now complains: he did not compel the trial court to act as it did. On or before the first day of trial, the court need only have attempted to obtain from defendant a waiver of his constitutional right to the assistance of conflict-free counsel. If it had been successful—as the record shows it likely would have been —it could properly have ordered substitution and then proceeded to commence trial with Charvet & Stewart as counsel of record for defendant. If it had not been successful, it could then have denied the substitution motion to "protect the record and defendant's right to effective assistance . . . ." (*Maxwell* v. *Superior Court, supra,* 30 Cal.3d at p. 620.) In that case, it could also have denied as untimely (*People* v. *Windham* (1977) 19 Cal.3d 121, 127-128 [137 Cal.Rptr. 8, 560 P.2d 1187]) defendant's motion to proceed pro se unless he was willing to commence trial forthwith. In short, the court had more than adequate means to properly retain control of the proceedings and hence must shoulder responsibility for its error.

(11b) We turn now from the fact of *Wood* error to its consequences. As stated above, to obtain reversal the defendant is not required to demonstrate specific prejudice but must show an actual conflict of interest burdening defense counsel and an adverse effect on counsel's performance arising from that conflict.

Defendant argues that *Wood* error is subject to automatic reversal. We cannot agree. We recognize that in a footnote the *Wood* majority used language that may perhaps be read to support defendant's position: "JUSTICE WHITE's dissent states that we have gone beyond the recent

decision in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" (450 U.S. at p. 272, fn. 18 [67 L.Ed.2d at p. 231], italics in original.) (19) In our view, the quoted language must be considered dictum and cannot be deemed an accurate statement of the law. This is because the words of the *Wood* majority are contradicted by their actions: in that case they did not reverse but merely vacated the judgment and remanded the cause for a hearing in the trial court on the question whether an actual conflict in fact existed. Faced with an inconsistency between what the high court says and what it does, we think that we must follow as binding authority the latter and not the former. (See *Brien* v. *United States*, *supra*, 695 F.2d at p. 15, fn. 10; see also *United States* v. *Winkle* (10th Cir. 1983) 722 F.2d 605, 611-612 [revealing a similar understanding of *Wood*].)

(20) Having considered the matter closely, we believe that reversal is not required on this record. We shall assume for argument's sake that defendant has shown an actual conflict of interest burdening Charvet & Stewart. But we conclude that he has not shown, and cannot show, any adverse effect on counsel's performance resulting from the alleged conflict. Our review of the record reveals that Charvet's attack on Munro's credibility was broad and deep. We cannot find or even conjecture any failing on Charvet's part that could be attributed to any information he or his partner Stewart could conceivably have received from Munro when they discussed the possibility of representation. Accordingly, we hold that the *Wood* error in this case does not warrant reversal.[3]

B. *Ineffective Assistance of Counsel*

(21) Defendant contends that he was denied his constitutional right to the effective assistance of counsel. He does not challenge defense counsel's

[3]Nor—contrary to the position Justice Broussard takes in his concurring and dissenting opinion—is vacation required in this case. As the analysis above reveals, the record clearly permits meaningful appellate review of the crucial issue of adverse effect. Whether or not it permits such review of the issue of actual conflict is immaterial here. To establish his claim, defendant must show *both* actual conflict and adverse effect. This he cannot do; he cannot show adverse effect. Therefore, vacation and remand for a hearing on actual conflict would be empty.

Although we have concluded that the trial court was not required to inquire about the possibility of a conflict of interest arising from the alleged literary-rights fee agreement because it was provided with no evidence of a conflict situation, we believe that in the future trial courts should follow the safest course and make an inquiry whenever they have any reasonable suspicion of the possibility of a conflict: by acting thus, they will protect the rights of the criminal defendant to the fullest extent practical and thereby avoid the risk of unnecessary reversals on appeal.

actual performance at trial or the effect of that performance on the proceedings. Rather, he asserts that the assistance provided to him must be presumed to have been ineffective because counsel was given only 30 days to prepare for trial.

We recognize that in some cases ineffective assistance must be presumed "without inquiry into the actual conduct of the trial" because "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small" that the cost of litigating the issue is unjustified. (*United States* v. *Cronic* (1984) 466 U.S. 648, 659-660 [80 L.Ed.2d 657, 668, 104 S.Ct. 2039].) But we do not believe that this is such a case.

It is true that the charges defendant faced were multitudinous and of the utmost gravity. There was also much evidence of various sorts and many potential witnesses. Further, at the September 14, 1981, hearing Charvet stated he would require "at least a 120 day continuance," and Hanson said Charvet might need "ninety days or 120 days." Finally, when trial commenced on October 19, 1981, Charvet stated, "I'm not as comfortable with just one month [of preparation] as I would have been with two or three."

But it is also true that at the September 14, 1981, hearing Hanson—who had worked on the case since August 1980 and was ready for trial—offered to give Charvet help in his preparation. Further, at the September 21, 1981, hearing Hanson opined that with his help *defendant* would be able to proceed pro se on the scheduled trial date of October 19, 1981 —and thereby implied that with his help Charvet would be able to proceed as counsel on that date. Moreover, Hanson did in fact give Charvet the help that he had promised. Finally, on the first day of trial Charvet—albeit "not as comfortable with just one month as I would have been with two or three"—did indeed answer ready.

Therefore, on this record we simply cannot presume that defense counsel's assistance was ineffective without inquiry into the actual conduct of the trial. Accordingly, we must reject defendant's point.

C. *Motion to Bar the Testimony of Munro and Miley*

(22a) Defendant contends that the court erred when it refused to bar Munro and Miley from testifying against him at trial. The facts relevant to this claim are as follows.

On December 17, 1980, a meeting was held at defendant's request and was recorded on audiotape. Those who attended included defendant, his then counsel Hanson, and prosecutor Norris. Defendant sought the meeting

to explore the possibility of negotiating a disposition to this case, and any other cases involving the "freeway killings," that would result in a sentence less than death. Before substantive discussions began, defendant sought a promise from Norris that the prosecution would not use anything he said in the course of the meeting for any purpose other than determining whether or not to participate in a settlement. Norris gave his promise. Hanson soon left the meeting. Thereupon substantive discussions began. In the course thereof, defendant made statements that incriminated Munro and Miley. The prosecution subsequently declined to enter into a negotiated disposition.

Pursuant to a discovery request and over the prosecution's objection, Munro's counsel and Miley's counsel each learned of defendant's statements. Apparently in part because of those statements, Munro and Miley each agreed to a bargain under which he would be allowed to enter a guilty plea on the condition that he would testify truthfully against defendant at trial. In the course of plea negotiations no reference was made to defendant or his statements.

Before the guilt phase opened, defendant moved to bar Munro and Miley from testifying against him at trial. He based his motion on a claim that the prosecution had obtained the agreement of each man to testify by using his statements in violation of its promise. Determining, inter alia, that the prosecution had committed no breach, the court denied the motion.

Defendant now contends that the court's ruling was error. In support, he argues that the prosecution breached its promise and thereby violated his rights under *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

(23) At the threshold there is a question whether the claim is properly raised. It is, of course, the rule that to preserve a *Miranda* claim for appeal a defendant must make a *Miranda* objection below. (E.g., *In re Dennis M.* (1969) 70 Cal.2d 444, 462 [75 Cal.Rptr. 1, 450 P.2d 296].) In this case, defendant made no such objection. Therefore, to the extent the point is predicated on *Miranda*, it appears not to be properly raised.

(22b) For the sake of discussion, however, we shall assume that defendant's claim is preserved in its entirety. Having considered the matter closely, we are of the opinion that the point must be rejected on the merits. The record contains credible evidence that the prosecution did not use defendant's statements to obtain the agreement of Munro and Miley to testify against him at trial—i.e., it did not *exploit* those statements either directly

or indirectly toward that end. Moreover, the record contains no evidence to the contrary.

Defendant asserts that the prosecution knew or at least should have known that it would be required to produce the statements to Munro and Miley in discovery. He also asserts that the disclosure of the statements led to their decision to testify. But such facts do not negate the conclusion that the prosecution's conduct simply does not amount to an exploitation of defendant's statements.[3]

Thus, the prosecution did not use defendant's statements to obtain the agreement of Munro and Miley to testify against him at trial. Consequently, it cannot be held to have violated its promise. Hence, the court's denial of defendant's motion was not error.

D. *Admission of Experimental Evidence*

(24a) Defendant contends that the court erred when it ruled admissible the testimony of a prosecution criminalist concerning an experiment conducted to determine whether the ligature marks on the neck of the body of Wells could have been made by a T-shirt as Munro had testified. As prosecutor Norris was about to elicit the testimony referred to above, defense counsel Charvet requested a hearing pursuant to Evidence Code section 402 outside the presence of the jury on the question whether the evidence was supported by an adequate foundation. The court asked Norris for an offer of proof. Norris responded that the criminalist would testify that he wrapped a T-shirt around a part of his body and concluded that the striations produced were similar to those found on the neck of Wells's body. Without asking the prosecution to produce any evidence on the matter and without giving any statement of reasons, the court denied the request for a hearing and effectively ruled the testimony admissible. On direct examination, the criminalist testified in conformity with the offer of proof, adding that he had wrapped the T-shirt around his upper arm. On cross-examination, he admitted that he had never read of such an experiment in the scientific literature and had never conducted it previously.

[3] Defendant also argues as follows: through the force of its promise—as prosecutor Norris himself admitted below—the prosecution was prohibited from presenting evidence of Sean King's body, which it had found by using his statements; therefore, through the force of its promise it was also prohibited from presenting the testimony of Munro and Miley. We agree that the prosecution was barred from introducing evidence of King's body: it had admittedly exploited defendant's statements to discover its location. But we cannot agree that it was barred from calling Munro and Miley as witnesses, as stated above, the record contains credible evidence that it had not exploited defendant's statements to obtain their agreement to testify, and contains no evidence to the contrary.

(25) The law that governs the issue at bar is settled. "Experimental evidence has long been permitted in California trial courts . . . ." (*People* v. *Roehler* (1985) 167 Cal.App.3d 353, 385 [213 Cal.Rptr. 353], citing *People* v. *Carter* (1957) 48 Cal.2d 737 [312 P.2d 665], and *People* v. *Spencer* (1922) 58 Cal.App. 197 [208 P. 380].) But "Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant [citations]; (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation]; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury [citation]. [¶] In the case of experimental evidence, the preliminary fact [citation] necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the [event in question] took place. The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is whether the conditions were substantially identical, not absolutely identical." (*Culpepper* v. *Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521 [109 Cal.Rptr. 110]; accord, *People* v. *Roehler, supra*, 167 Cal.App.3d at pp. 385-386.) (26) Admissibility also depends on proof, "with some particularity," of "the qualifications of [the] individual[] testifying concerning [the] experimentation . . . ." (*People* v. *Roehler, supra*, at p. 385.)

(27) The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation. (See *People* v. *Roehler, supra*, 167 Cal.App.3d at p. 385 [speaking only of burden of proof]; *Culpepper* v. *Volkswagen of America, Inc., supra*, 33 Cal.App.3d at p. 521 [same]; see generally Evid. Code, § 403, subd. (a) [speaking of burden of production as well as burden of proof].)

(24b) After review, we agree with defendant that the court's ruling was error. The prosecution simply failed to carry its burden as to foundation. For example, it did not produce any evidence to show the experiment was conducted under conditions similar to those of the Wells strangulation. It is not self-evident that the criminalist's upper arm and Wells's neck were similar in relevant aspect. Nor is it self-evident that the criminalist applied pressure to his arm the way Munro said defendant exerted force to Wells's neck. Further, the prosecution did not produce any evidence to show the qualifications of the criminalist. Indeed, on cross-examination the criminalist essentially conceded that he was unqualified to conduct the "experiment."

We recognize that the court's ruling implies by operation of law a finding of all the necessary foundational facts. (Evid. Code, § 402, subd. (c).) The

record, however, does not support such a finding. Accordingly, we are compelled to set that finding aside and to hold that the ruling predicated on it was erroneous.

(28) We do not believe, however, that the error was prejudicial—nor, to our surprise, does defendant claim otherwise. We are of the opinion that there is no reasonable probability that the erroneously admitted testimony had any marginal effect on the outcome (see *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]): the properly admitted evidence supporting guilt was strong, whereas the contrary evidence was weak; moreover, the erroneously admitted testimony was not substantial even with regard to the Wells killing, and therefore did not affect the balance of inculpatory and exculpatory evidence. Accordingly, we hold that the error does not require reversal.

E. *Admission of Testimony by the Parents of the Victims*

(29a) Defendant contends that the court erred when it allowed the parents of the victims to testify. In support he argues that he offered to stipulate to the testimony the prosecution intended to elicit, and that such an offer rendered the testimony itself irrelevant and inadmissible.

At trial the prosecution called one or both parents of many of the victims. From each it elicited testimony on such matters as what his son looked like, how old he was at the time of death, whether he had any money in his possession at the time he disappeared, and where and when he was last seen alive. From many of the parents it sought identification of photographs of the victims in life and in death. The defense offered to stipulate to the identity of the victims and to the admissibility of the photographs. The prosecution, however, refused to accept the offer. In conducting its examination, however, it did not elicit testimony on the effect of the crimes on the victims' relatives and friends.

In its broad form defendant's claim must be rejected. Contrary to what defendant implies, the defense simply did not offer to stipulate to the parents' testimony in its entirety. Thus, there was no offer that could have rendered the whole of that testimony irrelevant.

But to the extent that it concerns the parents' testimony to establish the identity of the victims and the foundation for the photographs, the claim has merit. (30) In *People* v. *Hall* (1980) 28 Cal.3d 143, 152 [167 Cal.Rptr. 844, 616 P.2d 826], disapproved on another point in *People* v. *Valentine* (1986) 42 Cal.3d 170 [228 Cal.Rptr. 25, 720 P.2d 913], we held that "If a fact is not genuinely disputed, evidence offered to prove that fact

is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." Through the offer of the defense, the facts covered by the proposed stipulation—the victim was a human being and was alive before the alleged criminal act was committed and dead afterwards—were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible. As we also held in *Hall*, "if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury." (28 Cal.3d at p. 152.) Thus, the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation.

(29b) Although the court erred by admitting the parents' testimony to establish the identity of the victims and the foundation for the photographs, we are of the opinion that the error was harmless. The prejudice threatened by an error such as that committed here is the inflaming of the jurors' hearts against the defendant. In our view, the improperly admitted testimony—which was not accompanied by any so-called "victim impact" evidence (see *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529])—had no potential to inflame the jurors and hence could not have exposed defendant to prejudice. Accordingly, we conclude that there is no reasonable probability that the erroneously admitted testimony had any marginal effect on the outcome.

F. Failure to Give Instructions Sua Sponte On the Reliability of Informer Testimony

(31) Defendant contends that the court erred by failing to instruct the jurors sua sponte that they should consider an informer's testimony to be inherently unreliable and should view such testimony with suspicion. We recently held to the contrary. (*People* v. *Hovey* (1988) 44 Cal.3d 543, 565-566 [244 Cal.Rptr. 121, 749 P.2d 776].)

III. Special Circumstance Issues

A. *Felony-murder Special Circumstances*

1. *Failure to Instruct on Intent to Kill*

(32) Defendant contends that the felony-murder special-circumstance findings must be vacated because the court did not instruct that intent to kill was an element of that special circumstance. We do not agree.

As we held in *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], "The court must instruct on intent to kill as an element of the felony-murder special circumstance when there is evidence from which the jury could find [citation] that the defendant was an aider and abetter rather than the actual killer." Here, all the evidence showed that defendant either actually killed the victims or was not involved in the crimes at all; there was no evidence that he was an aider and abetter. Accordingly, the court did not err in failing to instruct on intent.

2. *Sufficiency of the Evidence*

(33a) Defendant contends that the felony-murder special-circumstance findings must be vacated on the ground that they are not supported by sufficient evidence. (34) That special circumstance requires the trier of fact to find, inter alia, that the defendant committed the act resulting in death in order to advance an independent felonious purpose. (*People* v. *Weidert* (1985) 39 Cal.3d 836, 842 [218 Cal.Rptr. 57, 705 P.2d 380], following *People* v. *Green* (1980) 27 Cal.3d 1, 47-62 [164 Cal.Rptr. 1, 609 P.2d 468], which was decided under the 1977 death penalty law, former Pen. Code, §§ 190-190.6, Stats. 1977, ch. 316, §§ 4-14, pp. 1256-1262.) (33b) In this case, defendant argues, the evidence was insufficient to support such a finding.

(35) "In reviewing the sufficiency of evidence, the question we ask is '"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the [allegation] beyond a reasonable doubt."'" (*People* v. *Guerra* (1985) 40 Cal.3d 377, 385 [220 Cal.Rptr. 374, 708 P.2d 1252], quoting *People* v. *Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255], quoting in turn *Jackson* v. *Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573, 99 S.Ct. 2781], italics in original.)

(33c) Although we believe that the question is close, we are nevertheless of the opinion that a rational trier of fact could have found the independent-felonious-purpose element of each of the felony-murder special circumstances beyond a reasonable doubt. A rational trier could surely have found that defendant committed the acts resulting in the deaths of Macabe and Miranda, for example, in order to steal: there is evidence that he talked of attempting to obtain ransom for both. A rational trier could have inferred that in committing the acts resulting in the deaths of the other victims, which were strikingly similar to those resulting in the deaths of Macabe and Miranda, defendant acted with similar intent.

Defendant argues that the evidence was insufficient to support the findings as to Hyden and Turner because the record is devoid of any direct

evidence that either had any money on his person at the time of the crimes charged. We are not persuaded. The record appears to support an inference that each was carrying money at the relevant time. In any event, it is undisputed that the clothes of each were removed. Defendant asserts in substance that the perpetrator's sole object in taking the clothing must have been to facilitate or conceal the killings. The assertion, however, is without basis. Accordingly, we must reject it out of hand.

B. *Multiple-murder Special Circumstances*

1. *Failure to Instruct on Intent to Kill*

(36) Defendant contends that the multiple-murder special-circumstance findings must be vacated because the court did not instruct that intent to kill was an element of that special circumstance. Again we do not agree.

As we implied in *People* v. *Anderson, supra,* 43 Cal.3d at page 1150, the court must instruct on intent with regard to the multiple-murder special circumstance when there is evidence from which the jury could find that the defendant was an aider and abetter rather than the actual killer. As stated above, there was no evidence that defendant was an aider and abetter. Accordingly, the court did not err in failing to instruct on intent.

2. *"Multiple" Multiple-murder Special-Circumstance Allegations*

(37) Defendant correctly contends it was error for the prosecution to allege more than one multiple-murder special circumstance. (*People* v. *Anderson, supra,* 43 Cal.3d at p. 1150.) It follows that nine of the ten multiple-murder special-circumstance findings must be vacated on this ground.

IV. PENALTY ISSUES

Defendant raises a number of claims bearing on penalty. None, as we shall explain, establishes reversible error.

A. *Admission of Testimony by the Parents of the Victims at the Guilt Phase*

(38) Defendant contends that the testimony of the parents establishing the identity of the victims and the foundation for the photographs, which was erroneously admitted at the guilt phase (see part II E, *ante*), requires reversal of the judgment of death.

In support of his point, defendant argues at the threshold that the erroneously admitted testimony was before the jurors in their penalty phase deliberations. We agree. The court instructed the jurors that "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case."

Defendant then argues that the erroneously admitted testimony must be deemed prejudicial. We cannot agree. As we stated above, this testimony—which did not include any so-called "victim impact" evidence—had no potential to inflame a reasonable juror and hence could not have exposed defendant to prejudice. (See part II E, *ante*.)

B. *Admission of Murders to Be Tried in the Orange County Action*

(39) Defendant contends that the court erred when it allowed the admission of evidence of the four murders for which he was to be tried in the Orange County action. Specifically, he argues that as a result of the ruling he was improperly compelled to surrender one constitutional right to assert another: to present a defense to the Orange County murders at the penalty phase here, he had to surrender his privilege against self-incrimination and thereby reveal at least in part the defense he would mount in the Orange County action; to preserve his privilege against self-incrimination and thereby shield his defense in the Orange County action from disclosure, he had to forgo his right to present a defense to the Orange County murders at the penalty phase here.

To the extent that defendant's point is based on the United States Constitution, it is without merit. The federal Constitution, in our view, does not forbid imposing on defendant the choice required by the trial court's evidentiary ruling. (Cf. *McGautha* v. *California* (1971) 402 U.S. 183, 208-220 [28 L.Ed.2d 711, 726-733, 91 S.Ct. 1454] [the federal Constitution does not prohibit the states from having guilt and punishment determined in a unitary capital trial, even though in such a trial the defendant is compelled to choose either to speak on guilt and thereby waive his privilege to remain silent on punishment or to speak on punishment and thereby waive his privilege to remain silent on guilt].)

To the extent that defendant's point is based on the California Constitution, it is also without merit. Defendant argues that our decision in *Ramona R.* v. *Superior Court* (1985) 37 Cal.3d 802 [210 Cal.Rptr. 204, 693 P.2d 789], supports his claim. It does not. In that case we held that pursuant to the state constitutional privilege against self-incrimination the trial court, on request, must grant a minor immunity from use at trial of any statement

he makes in a fitness hearing. (*Id.* at pp. 806-811.) Our holding was based on the premise that in the circumstances there the minor must be deemed to be subject to "a compulsive sanction against exercise of the self-incrimination privilege." (*Id.* at p. 812 (conc. opn. of Grodin, J.).) We cannot conclude that defendant was subject to such a "compulsive sanction" in the circumstances here.

C. *Claims Relating to CALJIC Nos. 8.84.1 and 8.84.2*

Defendant makes a number of claims relating to the core penalty instructions delivered by the court. The court instructed the jury in accordance with former CALJIC No. 8.84.1 as modified and ultimately with section 190.3 of the Penal Code (hereinafter section 190.3).[6] The court also instructed in accordance with former CALJIC No. 8.84.2 as modified and ultimately with section 190.3.[7]

[6] The instruction was as follows. "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

[7] The instruction was in relevant part as follows. "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole."

1. *Failure to Delete Sentencing Factors Inapplicable on the Evidence*

(40) Defendant contends that the court erred by instructing on all the statutory sentencing factors and by failing to delete such factors as were inapplicable on the facts of this case. We rejected a similar point in *People* v. *Miranda* (1987) 44 Cal.3d 57, 104-105 [241 Cal.Rptr. 594, 744 P.2d 1127]. For the same reasons, we reject this point here.

2. *Statutory Sentencing Factor (a) and "Multiple" Multiple-murder Special Circumstances*

(41) Defendant contends that the court's instruction as to statutory sentencing factor (a) was prejudicial error because it effectively directed the jurors to consider 10 multiple-murder special-circumstance findings instead of 1. We agree that the instruction was erroneous: as we concluded above (see part III B 2, *ante*), there can be only one such finding in a proceeding. We cannot agree, however, that the error requires reversal. Having reviewed the record of the penalty phase in its entirety, we are of the opinion that there is no reasonable possibility that the error had any marginal effect on the balance of aggravating and mitigating evidence or on the consequent determination of the appropriateness of death: although we presume that the jurors considered the nine invalid special-circumstance findings independent of their underlying facts, we cannot conclude that they could reasonably have given them any significant independent weight. (See also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1281-1283 [232 Cal.Rptr. 849, 729 P.2d 115] (lead opn. by Grodin, J.).)

3. *The Scope of Statutory Sentencing Factor (b)*

(42) Defendant contends that the court's instruction as to statutory sentencing factor (b) was error. In support he argues that section 190.3 must be construed to limit the scope of that factor to crimes other than those of which the defendant was convicted in the capital proceeding. On this point we agree. (*People* v. *Miranda*, *supra*, 44 Cal.3d at pp. 105-106.) He then argues that the court's instruction did not so limit the scope of that factor. On this point, however, we disagree (see *id.* at p. 106) and so reject the claim of error.

4. *The Meaning of Statutory Sentencing Factor (i)*

(43) Defendant contends in substance that contrary to what he asserts to be the legislative intent informing section 190.3, the language of factor (i)

of the instruction on the sentencing factors may have misled the jurors to consider his "age . . . at the time of the crime" as a circumstance in aggravation. He misconstrues the legislative intent. In *People* v. *Lucky* (1988) 45 Cal.3d 259 [247 Cal.Rptr. 1, 753 P.2d 1052], we held that "the word 'age' in statutory sentencing factor (i) is used as a metonym for *any* age-related matter suggested by the evidence or common experience or morality that might reasonably inform the choice of penalty" (*id.* at p. 302, italics added) and hence may be considered in aggravation as well as in mitigation. Accordingly, we reject the point.

5. *Easley "Factor (k)" Error*

(44) Defendant contends that the language of factor (k) of the court's instruction pursuant to former CALJIC No. 8.84.1 (hereinafter former factor (k)) may have misled the jurors to his prejudice about the scope of their sentencing discretion and responsibility under the Constitution, and may also have misled them about the evidence they might consider in exercising that discretion and responsibility.

In *People* v. *Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813], we concluded at pages 877 and 878 that the language of former factor (k)—with its exclusive focus on "the crime" and not "the criminal"—might mislead jurors about the scope of their responsibility and about the evidence they might consider in exercising that responsibility. We observed at the same pages that in *Lockett* v. *Ohio* (1978) 438 U.S. 586 [57 L.Ed.2d 973, 98 S.Ct. 2954], and *Eddings* v. *Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869], the United States Supreme Court held that the trier of fact may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death" (*Lockett, supra,* at p. 604 [57 L.Ed.2d at p. 990], italics in original (plur. opn. by Burger, C.J.); accord, *Eddings, supra,* at p. 110 [71 L.Ed.2d at p. 8]).

After review, we cannot conclude that the potentially misleading language of former factor (k) was misleading in this case. In argument defense counsel Charvet told the jurors that they could and should consider such evidence and weigh it in mitigation of the penalty of death. Also, prosecutor Norris said to them, "Well, let me tell you, in terms of this penalty, you are to consider all the circumstances of his background." Indeed, in view of the foregoing, we believe that the jurors were led to consider the criminal as well as the crime and to weigh defendant's background and character evidence in mitigation. In conclusion, on this record we find no *Easley* "factor (k)" error.

concern expressed in *Brown* was substantially implicated. For example, both prosecutor Norris and defense counsel Charvet called on the jurors to make their penalty determination as a moral assessment of defendant's personal culpability, Norris arguing for death and Charvet for life. Neither "counted" the sentencing factors or referred in any way to the mandatory sentencing language. Rather, we believe that the jurors were adequately informed as to what they were to do, and how they were to proceed, in the determination of penalty. In conclusion, on this record we find no *Brown* error.

8. *Failure to Instruct Sua Sponte on "Burden of Proof" in Determining Penalty*

(47) Defendant contends that the court erred when it failed to instruct the jurors sua sponte that they might return a verdict of death only if they were persuaded beyond a reasonable doubt that the evidence in aggravation outweighed the evidence in mitigation and that death was the appropriate penalty. In support he argues that the due process clause requires such an instruction. We rejected the substance of this claim, however, in *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 778, [230 Cal.Rptr. 667, 726 P.2d]13] footnote 15.[6]

D. *Attack on the Constitutionality of the 1978 Death Penalty Law*

(48a) Defendant contends that the 1978 death penalty law is unconstitutional. (49) (See fn. 7.), (48b) We rejected the substance of this claim in *People* v. *Rodriguez, supra,* 42 Cal.3d at pages 777-779.[7]

V. DISPOSITION

For the reasons stated above, we conclude that nine of the ten multiple-murder special-circumstance findings must be set aside on the ground that only one such special circumstance could properly have been alleged. We conclude that in all other respects the judgment must be affirmed.

[6]Defendant also asserts that the equal protection clause requires the instruction. But since he does not present adequate argument on the point, we reject the claim as not properly raised.

[7]In view of the theories presented and the evidence introduced, the jury's guilt phase verdicts imply findings that defendant actually killed, and intended to kill, the victims (*Enmund* v. *Florida* (1982) 458 U.S. 782, 788-801 [73 L.Ed.2d 1140, 1145-1154, 102 S.Ct. 3368]). Having reviewed t[illegible] record in its entirety, we conclude that these findings are amply supported by the evidenc[illegible]d adopt them as our own. Accordingly, the imposition of the penalty of death on defendant does not violate the Eighth Amendment. (*Cabana* v. *Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 716-717, 106 S.Ct. 689].)

It is so ordered.

Lucas, C. J., Panelli, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred.

BROUSSARD, J.—I concur in the reversal of eight of the nine multiple-murder special-circumstance findings. As to the affirmance of defendant's convictions, the remaining special circumstances and perforce the penalty, I dissent.

Defendant requested that his appointed attorney be replaced by retained counsel whom the trial court at one point found to be burdened with a conflict of interest by reason of counsel's prior contact with a key prosecution witness. (See maj. opn., *ante*, at p. 829.) In addition, there were clear indications that defendant's retainer agreement included a literary-rights clause in favor of counsel, placing squarely before the court the possibility of yet a second conflict of interest. Absent further inquiry by the court, and an express and effective waiver by defendant of his constitutional right to unconflicted counsel, the court had a duty to deny defendant's motion for substitution of counsel burdened with such conflicts of interest. (See *Wood* v. *Georgia* (1981) 450 U.S. 261, 271-274 [67 L.Ed.2d 220, 230-232, 101 S.Ct. 1097]; see also *Wheat* v. *United States* (1988) 486 U.S. __, __ [100 L.Ed.2d 140, 149-152, 108 S.Ct. 1692].) No such waiver was obtained, and the court failed to fully explore the potential for conflict on either score; yet inexplicably it granted defendant's motion to substitute counsel and permitted the trial to proceed.

In pages of admirable scholarship, the majority set out the law applicable to a claim on appeal that defendant's counsel was burdened by an actual or potential conflict of interest. I have no quarrel with this learned exegesis. The majority go on to roundly defeat the People's multilayered claim that defendant waived the conflict. Again, I have no quarrel. Yet when we come to the application of the law to the facts, the majority stumble and fall. Under established principles of law (*Wood* v. *Georgia*, *supra*, 450 U.S. at pp. 272-274 [67 L.Ed.2d at pp. 230-232]; *United States* v. *Winkle* (10th Cir. 1983) 722 F.2d 605, 608-612; *Brien* v. *United States* (1st Cir. 1982) 695 F.2d 10, 14-15), defendant's convictions must be vacated and remanded to the trial court for a determination (1) whether a literary-rights agreement actually existed and (2) whether there was an actual conflict of interest arising from such agreement and from counsel's prior relationship with witness Munro adversely affecting counsel's performance such as to require reversal.

I am well aware of the pain and horror that this defendant has inflicted on so many. I too feel that his crimes are so shocking and heinous that it seems an outrage to question the lawfulness of the verdict in any way. Yet I am convinced that an impartial application of the law to the facts requires us to remand the matter to the trial court for an examination whether counsel operated under an actual conflict of interest which adversely affected his performance.

The majority find as to the possible existence of a literary-rights agreement that "[t]he court cannot be deemed to have known, or to have had reason to know, of the possibility of a conflict in this regard." (Maj. opn., *ante*, at p. 838.) They hold that "a court can be held to have knowledge or notice of the possibility of a conflict only when . . . it is provided with *evidence* of the existence of a conflict situation . . ." (*Id.* at p. 838, italics in original, citing *Wood*, *supra*, 450 U.S. 261), and that no such "evidence" was present here.

It is difficult to understand what "evidence" the majority would require. The general rule has been that the duty of inquiry arises when the court "knows or reasonably should know" that a potential conflict exists. (See *Cuyler* v. *Sullivan* (1980) 446 U.S. 335, 347 [64 L.Ed.2d 333, 346, 100 S.Ct. 700]; see also *United States* v. *Burney* (10th Cir. 1985) 756 F.2d 787, 791; *United States* v. *Winkle*, *supra*, 722 F.2d at p. 611; *Brien* v. *United States*, *supra*, 695 F.2d at p. 15, fn. 10.) *Wood* itself established a duty to inquire into the potential for conflict when there is simply an "appearance" or "suggestion" of conflict. (*Wood*, *supra*, 450 U.S. at pp. 272, 273 [67 L.Ed.2d at pp. 230-231].) In *Wood*, the potential conflict was latent in the proceedings; the high court held that the trial court should have suspected a potential for conflict from defense counsel's strategy in the case.

The defendants in *Wood* were employees at a pair of retail pornography establishments. They were convicted of distributing lewd materials and given heavy fines, the payment of which formed a condition of their probation. When defendants failed to pay the fines, their probation was revoked. Defense counsel leveled a constitutional attack against the statute under which defendants were convicted, rather than pleading for leniency. The court knew that the defendants' lawyer, who had also represented them at trial, had been hired by their employer, and that the defendants had believed that their employer would also be paying their fines. The state's representative requested that the court inquire into the possibility of a conflict of interest arising from defense counsel's dual loyalties, but no such

inquiry was made. The United States Supreme Court held that "the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further" (450 U.S. at p. 272 [67 L.Ed.2d at pp. 230-231], italics & fn. omitted), and remanded the case "to determine whether the conflict of interest that this record strongly suggests actually existed. . . ." (*Id.* at p. 273 [67 L.Ed.2d at p. 231].)

The trial court in this case was on notice that an indigent defendant in a notorious case had retained counsel, who refused to deny the charge that the retainer included a literary-rights agreement. When the court tentatively questioned defendant's retained counsel about the existence of such an agreement, he gave answers which, while nonresponsive in the strict sense, were as clearly suggestive of the existence of a possible conflict as the facts before the court in *Wood*.[1] Yet the court inquired no further. To say that these facts merely "lay a basis for speculation" as to the existence of a literary-rights agreement (maj. opn., *ante*, at p. 838) is to dodge the clear implications of the *Wood* holding.[2]

A potential conflict of interest implicates more than just the defendant's interest in effective assistance of counsel. The Supreme Court has recently recognized that a trial court justifiably may refuse to accept a defendant's waiver of his attorney's potential conflict of interest, in order to vindicate the state's interest in just verdicts, in preserving the appearance of fairness, and in preventing unethical practices by attorneys. (*Wheat* v. *United States*, *supra*, 486 U.S. ___, ___[100 L.Ed.2d at pp. 149, 151].) The court recognized that potential conflicts may be difficult to evaluate in the murky light of pretrial hearings, but maintained that "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflict warrants [different] counsel." (*Id.* at p. ___[100 L.Ed.2d at p. 149].) Under the circumstances of this case, the People's charge that defense

[1] When questioned by the court about the existence of a literary-rights agreement between defendant and himself, counsel would neither confirm nor deny it. He argued in defense of such agreements, however, and stated that the prosecution "has absolutely no right to go into any fee arrangement . . . ." (See maj. opn., *ante*, at pp. 828-829.)

[2] It is true that unlike the trial court in *Wood*, *supra*, 450 U.S. 261, the court below did not know what arguments counsel planned to make on defendant's behalf and thus could not know whether counsel's manner of representation would in some way indicate the existence of an actual conflict. This is due simply to the timing of defendant's request to substitute counsel, however, and does not diminish the strength of the indications that such a conflict was *possible*. As the high court pointed out in *Wheat*, the court normally must examine a potential conflict of interest "in the murk[y] pre-trial context when relationships between parties are seen through a glass, darkly." (*Wheat*, *supra*, 486 U.S. at p. ___[100 L.Ed.2d at p. 151].)

counsel's retainer was in part a literary-rights agreement was utterly plausible. The state's interest in the substance and appearance of justice, as well as its interest is preventing unethical practices by attorneys, required a full inquiry into the existence of such an agreement.

With respect to counsel's prior relationship with witness Munro, the majority concede that the trial court committed error under *Wood* (*supra*, 450 U.S. 261) by ordering the substitution of retained counsel in place of defendant's appointed counsel without any attempt to obtain a waiver from defendant of his constitutional right to conflict-free counsel.[3] The majority misinterpret *Wood*, however, to require that even when a trial court has failed to inquire fully into a potential conflict, unless defendant can show *from the record* that counsel's conflict of interest adversely affected counsel's performance, his convictions must stand. (Maj. opn. at p. 843.)[4] "[A]ssum[ing] for argument's sake" that counsel had an actual conflict of interest (maj. opn. at p. 843), the majority declare themselves unable to "find or even conjecture any failing on Charvet's part that could be attributed to any information he or his partner Stewart could conceivably have received from Munro when they discussed the possibility of representation." (*Id.* at p. 843.) The reason that the majority cannot fully determine whether there was in fact an actual conflict arising from counsel's representation of Munro is that although the trial court determined that counsel had a brief contact with Munro, it failed to inquire into and resolve the factual disputes raised by the district attorney and counsel regarding the extent to which this representation presented a potential for a conflict of interest affecting counsel's representation of defendant. In fact, the court seemed more concerned that counsel's contact with Munro presented some unfairness to the People, who intended to rely upon him as a central prosecution witness.

When the trial court fails to inquire into an apparent conflict of interest and fails to resolve the question whether there is an actual conflict, it leaves behind a record which is inadequate for a determination whether there was an actual conflict which adversely affected counsel's representation of the defendant. The lesson of *Wood* v. *Georgia*, *supra*, 450 U.S. 261, is that when such a defective record prevents meaningful appellate review, the reviewing court should vacate the judgment below and remand the matter to the trial

[3] Indeed, they defend the point vigorously and at length. (See maj. opn. at pp. 838-841.)

[4] The majority's discussion on this point is flawed by its failure to consider vacation and remand as an alternative to outright reversal. Such an omission is puzzling since this was the disposition in *Wood* itself, and was also central to the discussion of that case in *United States* v. *Winkle*, *supra*, 722 F.2d at pages 611-612 and *Brien* v. *United States*, *supra*, 695 F.2d 10, 15, footnote 10, cited by the majority.

court for a hearing to determine whether there was an actual conflict which adversely affected counsel's representation of the defendant. I would therefore vacate all counts and remand to the trial court to determine (1) whether there was a literary-rights agreement between defendant and his retained counsel, and (2) whether the conflict of interest resulting from such agreement, if it existed, and from counsel's prior relationship with witness Munro adversely affected counsel's performance.

ORDER DUE
March 10, 1989

ORDER DENYING REHEARING

Crim. 22530 No. S004440

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

WILLIAM GEORGE BONIN, Appellant

Appellant's petition for rehearing DENIED.

Chief Justice

Supreme Court of the United States

No. A-834

William George Bonin,

Petitioner

v.

California

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 31, 1989.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 18th day of April, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the United States Constitution provides, inter alia, that:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VI of the United States Constitution provides, inter alia, that:

> "Section 1. In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

Amendment VIII of the United States Constitution provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

§ 190.2. [Mandatory penalty upon special findings.] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and

was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [Former section repealed and new section added by initiative adopted at the General Election, November 7, 1978.]

§ 190.4. [Special finding of truth of each alleged special circumstance.] (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding w Jer a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6). [Former section repealed and new section added by initiative adopted at the General Election, November 7, 1978.]